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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 194

ATLANTIC COAST LINE RAILROAD COMPANY AND WILLIAM SMITH, APPELLANTS,

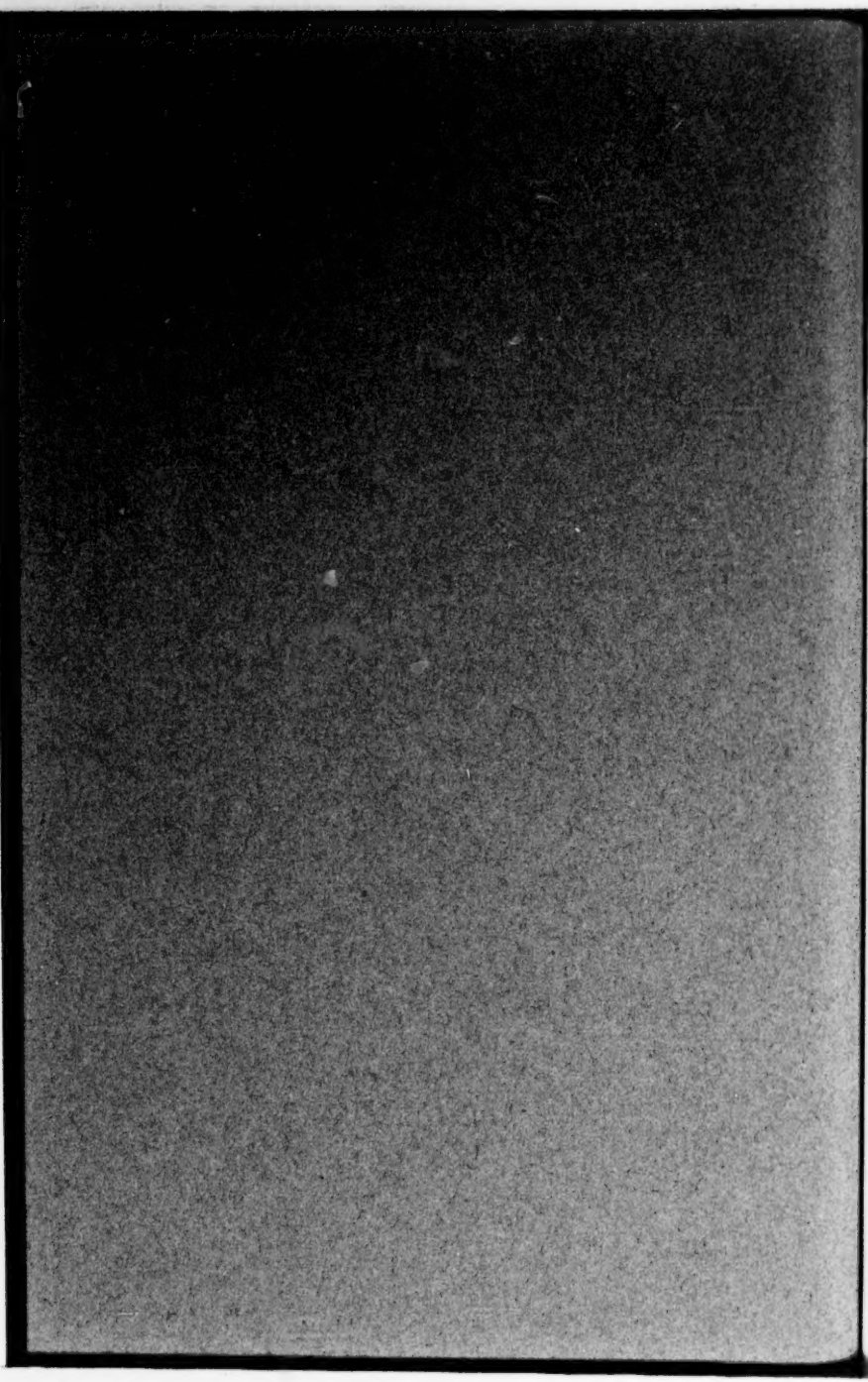
vs.

KATHERINE H. FORD

APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

FILED JULY 5, 1932

(36,891)



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IN SUPREME COURT OF SOUTH CAROLINA

Statement of Case

This action was commenced by the service of the summons on the 6th day of April, 1929. The suit was brought to recover damages in the sum of Twenty-Five Thousand ($25,000.00) Dollars for personal injuries alleged to have been sustained by Katherine H. Ford, the plaintiff, as the result of a collision between a passenger train of the defendant Atlantic Coast Line Railroad Company, operated by its engineer and co-defendant William Smith between Charleston, S. C., and Greenville, S. C., and an automobile at a public highway crossing of defendant railroad company's track between Manning, S. C., and Alcolu, S. C. The roadbed and track of the railroad company between the said termini lies wholly within the State of South Carolina. At the time of such collision, the plaintiff was riding on the front seat of such automobile, which was being driven by her husband, George C. Ford.

The complaint charges negligence and wilfulness on the part of the defendants in the operation of such train in a number of particulars which are specifically set out therein.

The answer, after denying the allegations of the complaint, sets up the affirmative defense of gross contributory negligence and contributory wilfulness on the part of the plaintiff, and in addition that Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, on which the plaintiff specifically relied in her complaint, was null and void as being a regulation of interstate commerce in violation of Article I, Section 8, subdivision 3, of the Constitution of the United States, and further that said Sections 4903 and 4925 as construed by the Supreme Court of South Carolina denied to the defendant railroad company the [fol. 5] equal protection of the laws and deprived it of its property without due process of law, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

The case was tried before Judge M. L. Bonham and a jury at the October, 1929, term of the Court of Common Pleas

for Clarendon County, and resulted in a verdict, on October 31, 1929, in favor of the plaintiff for Seventy-Five Hundred ($7,500.00) Dollars, actual damages.

From the judgment entered on such verdict, this appeal is prosecuted. As the appeal presents grave questions of constitutional law, it is necessary for a full determination thereof that the pleadings and all of the testimony be set forth in the transcript.

IN COURT OF COMMON PLEAS OF CLARENDON COUNTY

COMPLAINT

The plaintiff, complaining of the defendants, alleges:

1. That at the times hereinafter mentioned the defendant Atlantic Coast Line Railway Company was, and now is, a corporation organized and existing under the laws of one of states of the United States of America and conducting a railroad business in the County of Clarendon, State of South Carolina, and owning tracks and other property and having agents in said County for the conduct of its business therein.

2. That on or about the 4th day of March, 1928, plaintiff, was riding with her husband, George G. Ford, who was driving a Buick touring car along a public highway in Clarendon County, State aforesaid, about half-way between the towns of Manning, S. C., and Alcolu, S. C., and attempted to cross the tracks of the defendant Atlantic Coast Line [fol. 6] Railway Company where they cross the said highway, the crossing being generally known as the "Trinity Crossing," when one of the trains of the defendant Atlantic Coast Line Railway Company, traveling from Manning to Alcolu, ran into the said Buick automobile on said Trinity Crossing, crushed said automobile and knocked it into a large ditch, was knocked unconscious and seriously and painfully injured, the bones in her left knee being separated or fractured, her face and scalp being cut, torn and lacerated, and various parts of her body being cut and bruised, and as a result of the separation of the bones of her said knee, the cutting, tearing and lacerating of her face and scalp and the cutting and bruising of her body, plaintiff was forced to remain in bed for five weeks, and thereafter-

wards for several months forced to walk on crutches; and plaintiff has been permanently injured and has permanently lost the full use of her left knee, and has suffered, and continues to suffer, great pain and mental anguish, all of which is to the damage of plaintiff in the sum of Twenty-Five Thousand ($25,000.00) Dollars.

3. That just a short distance above the place of the collision is the proper place of giving the corssing signals, and said signals should have been continued until the said crossing had been passed by the engine of said train of cars, and on this occasion the defendant Atlantic Coast Line Railway Company, its agents and servants, and particularly its agent and servant, the engineer William Smith, who was operating said engine, failed and refused to give the said signals at the said place in the manner required by law, or to keep a lookout or see the plaintiff in her position of great and imminent danger, but without the continuing of the blowing of the whistle or ringing the bell of said engine until the [fol. 7] crossing was passed and without stopping said train drove it on into plaintiff, and the car in which she was riding at a great and rapid rate of speed, and failed and refused to apply the brakes or to use and exercise other devices for stopping said train until after the plaintiff had been violently thrown from the automobile and injured as alleged above.

4. That the aforementioned damages to the plaintiff was directly and proximately caused by the joint wilful, reckless, wanton, negligent and unlawful conduct of the defendant, Atlantic Coast Line Railway Company, its agents and servants, and particularly its agent and servant the defendant, William Smith, engineer of said engine, in the following particulars:

(a) In the failure of defendant Atlantic Coast Line Railway Company, its agents and servants in charge of the operation of the said train to keep the proper lookout.

(b) In the failure of defendant Atlantic Coast Line Railway Company and its agents and servants in charge of the operation of said train to stop the same and avoid the said collision.

(c) In the failure of the defendant Atlantic Coast Line Railway Company, its agents and servants, in charge of the

operation of said train to stop the same before plaintiff was thrown from the said Buick automobile.

(d) In the failure of the said defendant Atlantic Coast Line Railway Company to have said train equipped with proper brakes or other devices for stopping same.

(e) In having said train operated by an incompetent engineer.

(f) In the failure of Atlantic Coast Line Railway Company to provide a safe crossing at the place of the collision.

(g) In the failure of defendant Atlantic Coast Line Rail- [fol. 8] way Company, its agents and servants in charge of the operation of said train, and particularly on said engine, to give the signals in the manner required by Sec. 4903 of Volume 3, Civil Code of South Carolina for the year 1922.

Wherefore plaintiff demands judgment against the defendants for the sum of Twenty-Five Thousand Dollars together with the costs of this action.

W. C. Davis, and J. W. Wideman, Plaintiff's Attorneys.

In Court of Common Pleas of Clarendon County

Answer

The defendants, answering the complaint herein:

For a first defense:

1. Admit the allegations of Paragraph I thereof.

2. Admit so much of Paragraph II thereof as alleges that at the time therein mentioned the plaintiff was riding with her husband in a Buick automobile, and that said automobile collided with a train of the Defendant railroad company at the crossing generally known as "Trinity Crossing," in Clarendon County, South Carolina, but deny all the remaining allegations of Paragraph II thereof.

3. Deny all the allegations of Paragraph III thereof.

4. Deny all the allegations of Paragraph IV thereof.

For a second defense allege:

1. That the defendants operated the locomotive and train in a careful manner and in full compliance with all the laws governing its operation at the time and place mentioned in the complaint; but that the plaintiff and her com- [fol. 9] panion traveled for a mile along the side of the railroad track and in full view thereof and turned out of the main highway on which they were traveling at a point on the edge of the right of way and immediately adjacent to said track, and with the train of the defendant in full view in the day time did not stop, look or listen, but rushed on the said track and attempted to cross it ahead of the train in a grossly careless and reckless manner, as a result of which the accident happened. That the plaintiff either saw the train or was guilty of gross negligence in failing to see the same, and could have stopped the said automobile or warned the driver of the danger, and should have done so, which would have prevented the injury complained of.

2. That the plaintiff wilfully and knowingly and with gross negligence contributed to her injury as a proximate cause thereof by her own acts and careless conduct in wilfully and negligently guiding, directing, controlling and participating in the operation of said automobile in the endeavor to speed across the railroad track in the face of an obvious danger, thereby causing her own injury, for which these defendants are in no wise responsible.

2. That the train approached on the side of the automobile upon which plaintiff was sitting and in her plain view, and it was her duty to stop the automobile or warn the driver of the danger from same, all of which she failed to do, and by her gross negligence in above particulars contributed to her own injury as the proximate cause thereof.

For a third defense alleges:

1. That the train with which plaintiff came in collision [fol. 10] was a regular through passenger train of the defendant railroad company, running from Charleston, South Carolina, to Greenville, South Carolina, and as such was, on this occasion, and regularly, engaged in interstate commerce and in the transportation of interstate mail; and that as applied to a train so engaged, Sections 4903 and

4925 of Volume 3 of the Code of Laws of South Carolina of 1922, as construed by the Supreme Court of South Carolina, imposes a burden upon and is an unlawful regulation of interstate commerce in violation of Article I, Section 8, Paragraph 3, of the Constitution of the United States.

For a fourth defense allege:

1. That Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina of 1922, these being the sections under which this suit is brought, as construed by the Supreme Court of South Carolina, deny to these defe-dants the equal protection of the laws and deprive them of their property without due process of law, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States and of Article I, Section 5, of the Constitution of the State of South Carolina.

Henry E. Davis, DuRant & Sneeden, Defendants' Attorneys.

In Court of Common Pleas of Clarendon County

Statement of Evidence

George G. Ford (white) was called as a witness on behalf of the plaintiff and, having been duly sworn, testified as [fol. 11] follows:

Direct examination.

By Mr. Davis:

Q. Mr. Ford, on the 4th of March, of last year, 1928, where were you living?

A. At Mocksville, North Carolina.

Q. All right now, it is very hard to hear in this court house, so you will have to talk louder. You were living in North Carolina?

A. Mocksville, North Carolina.

Q. Where were born and raised?

A. Georgetown, South Carolina.

Q. How long have you been living in North Carolina?

A. Seventeen years.

Q. On the 4th of March, or just previous to the 4th of March, where were you going?

A. Going to Charleston for the week-end from Mocksville.

Q. Was that the time we had those big floods and the highways all washed away?

A. Yes, sir. When I got to Florence, I didn't know it until then, they detoured me on the eastern side of the Coast Line track, and I never struck the highway until I got to the Santee River Swamp.

Q. Then you went by the Coastal Highway going to Charleston?

A. Yes, sir.

Q. On coming back from Charleston tell what happened?

A. I left Charleston at 6:20 on the morning of March 4th. It was Sunday. It was a misty morning, cloudy, and raining on us practically all the way. Not knowing the roads, I passed the detour, and seeing the highway I came on up, [fol. 12] and I run up against a barricade, which I think was near Kingstree; I don't know; I had never been there before. I turned around and came back practically a mile, and at a filling station I saw a detour sign and turned to the right. After going up the road I stopped a man in a car and I said, "Is this the way to Florence?" He said, "No, you have passed the detour about ten miles, but you can get there by going by Manning and Alcolu; just follow me and I will show you the road." I got back in my car and about the time I got in my car he was gone, and I didn't see him any more.

Q. You remember yesterday morning, do you not?

A. Yes, sir.

Q. Was that Sunday morning similar to yesterday morning?

A. Very similar morning, except that yesterday morning there was no misty rain, while it was that morning.

Q. You came on to Manning as you were directed?

A. Yes, sir; I was told that I could go through Manning and Alcolu.

Q. Who was driving the automobile you were in?

A. I was driving.

Q. What kind of car were you driving?

A. Sport model Buick touring car.

Q. Now, on this morning you were driving that Buick automobile, you say it was raining, were the curtains up?

A. Yes, sir.

Q. In that car you sit on the left of the car to drive, do you not?

A. Yes, sir.

Q. Who was with you?

A. My wife.

Q. The plaintiff in this case?

A. Yes, sir.

[fol. 13] Q. Was your wife sitting on the front seat with you, or on the back seat?

A. On the front seat, on my right.

Q. What was in the back part of your car?

A. I had, well, various things in there. One thing, I had a very valuable set of dogs on the back seat, valued at about $250.00.

Mr. DuRant: No allegation about any dogs, if your Honor please.

The Court: No.

Q. Did you have anything else?

A. I had a package of empty fruit jars that my wife had sent her sister with fruit and vegetables in them.

Q. They were in the back?

A. Yes, sir.

Q. Have any suitcases?

A. I had two suit cases in the trunk on the back of my car. There was a trunk on the back of the car, and in that trunk there were two suitcases that fit tight in that trunk.

Q. Now, you passed through Manning, and on out over Black River Swamp; after you pass the swamp I believe the road runs along side the railroad the*tr* for a consid*the road runs along side the railroad there for a consid*erable distance, does it not?

Q. Yes, sir.

Q. At about what rate of speed were you driving?

A. Well, no speed. At no time, from the time I left Charleston, did I exceed thirty-five miles an hour, because, my wife being of a very nervous temperament, and the roads being slippery, I know I never at any time exceeded thirty-five miles an hour.

Q. Had you ever driven in Clarendon County in an automobile before?

[fol. 14] A. No, sir.

Q. Did you know anything about the schedules of the Atlantic Coast Line?

A. No, sir; I had been away from this country too long to know anything about that.

Q. Mr. Ford, as you approached the point of this accident, was there anything to slacken your rate of speed from what you had been driving on the highway? Anything that slackened your——

A. When I got up to this detour sign there was also a puddle of water right at the *trun*. I immediately slowed down.

Q. You were looking for the way to Florence?

A. Yes, sir. I was also looking for neghborhood roads. There was one to the left, and I was looking out for that, and I was looking at this detour sign, and I looked back to see if a train was coming, and saw nothing, and I rode on up to the detour sign, and turned and crossed the railroad.

Q. You say there is a neighborhood road near the crossing there, leading to the left?

A. Yes, sir.

Q. On this highway, which is Number 26, there are a good many automobiles?

A. Yes, sir.

Q. The road leading out there by Gable to Florence is Number 4?

A. Yes, sir; that is the route I turned in on.

Q. When you drove up there were you carefully looking out for all those different things?

A. Yes, sir. I was running very slow; I was hardly moving at all when I struck the railroad. When I went to make the turn I looked through the side of my car. I was already looking in front, and I glanced over that way and saw [fol. 15] nothing, then I turned to look at the sign before I crossed the road.

Q. After looking at that sign, after looking in every direction when you were at the sign—how far is it from that point to the railroad track in your judgment?

A. I would say as far as from here to that door, sir (indicating).

Q. Not over fifteen or twenty feet?

A. I would say twenty-five feet, may be thirty.

Q. You say you had almost stopped before you made the turn?

A. I know I wasn't making over five miles an hour. My car was in neutral, and my foot was on the brakes.

Q. Were your brakes in good shape?

A. First class shape; were then and are now.

Q. Taking that car at the time of that accident, the distance between the sign and the railroad, and the rate at which you were traveling, if you had had any warning of a railroad train crossing that crossing, could you have stopped your car?

A. Yes, sir; at the speed I was——

Mr. DuRant: If your Honor please, he is getting into speculative matters. He can tell the facts and circumstances and——

The Court: He asked him if he could have stopped if he had had any warning. I don't see any objection to that question. He saw the distance, he has testified to the speed, he could say whether he could have stopped.

Q. If you had had any warning of the train, could you have stopped your car between the sign and the crossing?

A. Yes, sir; in half the distance.

Q. In what distance can you stop that car, say you were running ten miles an hour?

A. In the length of the car. I can stop her in the length [fol. 16] of the car running twenty miles an hour.

Q. It was equipped with four-wheel brakes?

A. Yes, sir.

Q. You say you can stop it in that length?

A. Yes, sir.

Q. Yes, sir. Now, Mr. Ford, when you were crossing that crossing, or at any time while you were traveling along that highway, did you hear any signal given by the engineer of that train?

A. Absolutely none, Mr. Davis.

Q. If a bell had been continuously rung as it was coming up to that crossing, or a whistle continuously sounded while you were there, would you have gone on the crossing?

A. Not unless I had wanted to commit suicide. If the bell had tapped I was running slow enough to stop. I certainly would not have driven in front of a train with my wife——

Mr. DuRant: We object, if your Honor please, to the argument.

Q. Is your engine very silent?

A. Yes, sir. I can take you out there now—it has been rebuilt since then at a cost of $900.00—and start it up and you can hardly hear it.

Q. You say you heard no whistle——

Mr. DuRant: Nothing in this about any automobile injury, if your Honor please.

Mr. Davis: He is just describing the lack of noise of the car.

The Court: You are instructed, Mr. Foreman and Gentlemen of the Jury, that the injury to the automobile is not one of the elements of damage alleged in the complaint.

Q. You say you drove up to the sign and you looked the [fol. 17] best you could, then you started across the track hearing nothing?

A. Hearing nothing and seeing nothing.

Q. What was the first thing that attracted your attention to the train?

A. We had practically cross- the track, as we were rolling over the track my wife said, "Train," just that way. I never even heard it then, not a sound; the locomotive was as near as that railing (indicating), so near that I couldn't see the top of the boiler. I just remember the back of the car rising off the ground, and when I regained consciousness the train was stopped.

Q. Where were you when you came to yourself?

A. In a ditch of water; two men were holding me.

Q. Where was your wife?

A. As well as I can remember, she was in a sitting position over there further over than I was, near the railroad.

Q. Describe the hurts and injuries there?

A. The first thing I remember somebody came up to me—at least when I came to, a couple of men were holding me. I said, "What's the matter," and they said, "The train hit you." Blood was all over my face, and I saw my wife sitting over there on the fill, and I remember somebody helping us to an automobile, and we were taken to Alcolu, and I think my head was treated and her face was treated.

Q. Who treated you at Alcolu?

A. Dr. Brockinton.

Q. I believe he is the railroad doctor, is he not?

A. Yes, sir.

Q. He treated you there?

A. Yes, sir.

Q. After you left Alcolu where did you go?

[fol. 18] **A. I was taken to the—after he treated us there he took us to a railroad boarding house in Alcolu, and there is where he left us.**

Q. Did you go back down to the wreck?

A. Yes, sir; after he got through fixing my head up.

Q. Did you see the condition your car was in at that time?

A. Yes, sir.

Q. How was the car lying?

A. The car was lying with the front wheels on the shoulders, looking in the opposite direction from which I was going when I was struck.

Q. Was it in the ditch?

A. It was over in the ditch, over on the north side of the Florence road. This car, the rear end of it was over in the head wall.

Q. Did you have a spare tire on the back of your car?

A. Yes, sir. I never saw that though; I don't know what became of that. The two front tires and the spare tire I never saw at all. My grip was off—I was told—

The Court: Don't tell what you were told.

Q. Did you take any pictures of the car?

A. Yes, sir; these are the pictures that I took of the car. This is the picture of the car before the wreck (indicating), and these are the pictures taken of the car after the wreck, before any repairs were made.

Mr. Davis: We offer these in evidence.

Mr. DuRant: If your Honor please, we don't know just the purpose these are put in for. In the answer we admit there was a collision there between the automobile and the train, and we don't know what—they are not asking damages to the car, so we don't see the relevancy of them.

The Court: It might have some value with reference to [fol. 19] the speed it was hit, or where it was hit.

Mr. DuRant: For that purpose there is no objection, but Your Honor will notice that they have not alleged any unlawful speed. I never saw a complaint before that didn't have that in it.

Mr. Davis: And I have never seen one that wasn't running carefully.

(Pictures above referred to introduced in evidence as "Exhibits 1 to 6," inclusive.)

Q. You say you came back down to the wreck; what did you have done with your car?

The Court: Mr. Davis, what is the relevancy of that?

Mr. Davis: I will not press that. You——

Q. Where did you take your wife from Alcolu?
A. To Sumter.
Q. Did you take her to a doctor there?
A. Yes, sir. I took her to the hotel and immediately 'phoned Dr. Epps and he came and saw her.
Q. Then from there where did you take her?
A. I expected to go the next day, but she was unable to move, so I spent the following day in Sumter, and on the third day I took her on to Mocksville, my home.
Q. As a result of the accident, from there until you got to Mocksville was at a cost of what?

Mr. DuRant: We object, if your Honor please.
The Court: You mean in money?
Mr. Davis: Yes, sir.
The Court: You are not suing for that.
Mr. Davis: Very well.

Q. You took her from Sumter to Mocksville?
A. Yes, sir. I wired a physician in Mocksville to have an ambulance ready, and we carried her home.
Q. How long was she in bed?
A. A month or six weeks; I don't know how long, but a [fol. 20] month at least.
Q. Did she have a nurse?
A. Yes, sir.
Q. The doctor attended her daily, did he not?
A. Yes, sir; two visits a day.
Q. Well, sir, what has been your wife's condition since that time?
A. Well, she has been awfully nervous; just a bunch of nerves, suffering a great deal of pain. She can't get along without a crutch; can't get up and down the steps without

it. She is unable to do home duties that she could do before the acident.

Q. She did do her home work before?

A. Yes, sir. She is always in pain. In fact, she has never been free of pain, except a little while temporarily, since the accident.

Mr. DuRant: If your Honor please, I find that I was correct a while ago in a part of this. The high rate of speed is not given as one of the specifications of negligence in this case. If you will look in paragraph three, it simply tells how it happened, but when it comes down to the specifications of negligence, that is not mentioned as one of the specifications of negligence, and it has been held that where the specifications of negligence are set out, there is no negligence but that.

The Court: Yes, it seems to be a part of the narrative of the event.

Cross-examination.

By Mr. DuRant:

Q. Mr. Ford, was your wife in good health before?

A. Yes, sir; perfect.

Q. Perfect health?

A. Yes, sir; and very active.

[fol. 21] Q. Very strong?

A. Yes, sir; she is——

Q. For a lady, I mean?

A. Yes, sir; her health was all right.

Q. Yes, sir. All right, now, you ride about in a car a good deal in North Carolina, do you not?

A. Yes, sir.

Q. In North Carolina it is the law that you have to stop before crossing a railroad track, isn't it?

Mr. Davis: That is not the law here, if your Honor please.

A. That was the law there——

The Court Stop when an objection is made until I rule. That is not the law here, but I suppose it is to show that a driver of a car was accustomed to stop.

Mr. DuRant: Yes, sir.

Q. So you drove under that law for a number of years?

A. Yes, sir; when it was the law, but it has not been the law for some time.

Q. To stop at railroad crossings?

A. Yes, sir.

Q. You knew this was a railroad crossing?

A. Yes, sir.

Q. You saw the sign and saw the railroad?

A. Yes; I saw the railroad.

Q. As a matter of fact, it is in sight for a mile right along the road where you were driving?

A. Yes, sir.

Q. As I understand it, you turned in there very slowly, looking at the signs?

A. After looking at the sign I looked to the railroad before I made the turn.

Q. That was while you were on the highway?

A. Yes, sir; while I was on the turn of the highway. I [fol. 22] looked right back——

Q. You looked down the railroad track?

A. Yes, sir.

Q. You could see down it a mile?

A. I don't know, I wouldn't say that, not the position I was in, but I could see considerable distance.

Q. Three quarters of a mile?

A. I could see down very near to the whistle post; I suppose three or four hundred yards.

Q. Was that before or after you read the sign?

A. That was before. I read the sign as I was making the turn.

Q. As a matter of fact, Mr. Ford, didn't you stop there and look back at those signs, and get the names of the places, and how far it was to Florence?

A. No, sir; I looked—as my car turned I looked that way at the railroad, then glanced back at the sign, and turned my head.

Q. And didn't look at the railroad any more?

A. I was right on the railroad. I looked at it before I crossed it, but I didn't look at it again before I was on it. Nothing to call my attention; not a sound.

Q. I believe you say you didn't hear a thing until it was all over?

A. I didn't hear a thing until I saw the train.

Q. When your wife said, "Train." And you didn't hear anything until it was all over, that right?

A. Yes, sir.

Q. Your motor, I believe you say, is noiseless in operation?

A. Yes, sir.

Q. It is your contention that the Coast Line trains are noiseless too? In other words, I want you to explain how that locomotive slipped up on you without making any [fol. 23] sound?

A. Well, if any of the jury will get in my car this afternoon I can drive them up there, and they won't hear it unless it blows, until it passes. This was a damp morning, and on a damp morning the wheels don't make much fuss on the railroad.

Q. You had about a dozen fruit *pars*, I believe?

A. Yes, sir; possibly a couple of dozen. I didn't count them. One carton; I never counted them. I just told my wife's sister to have them dumped in the car, and a little boy there put them in the car.

Q. You had carried them down there with you?

A. No, sir. I said, at various times, my wife had sent canned fruit in them to her from the mountains, and these jars had accumulated, and just as we were getting in the car to leave, she suggested, "I have a lot of empty fruit jars that you might need, take them along"——

Q. Do you know what was in those jars when they were sent down there?

A. No, sir. Possibly fruit, possibly some vegetables. Possibly an accumulation of a couple of years.

Q. Preserves?

A. Yes, sir.

Q. Preserved in alcohol?

A. No, sir.

Q. What were they preserved in?

A. I don't know.

Q. You didn't have any whiskey along?

A. No, sir.

Q. Mr. Ford, of course those fruit jars suggest whiskey, and whiskey suggests drinking, and drinking suggests getting drunk, and getting drunk suggests running very fast; were you drinking that morning?

[fol. 24] A. No, sir.

Q. No whiskey in the car at all?

A. No, sir; I had a little bottle such as pepper comes in, and I had a little bit of whiskey and water in that. My wife being nervous, the doctor told me to carry some ammonia along. I had no ammonia that morning, so I asked the people there if they would give a little whiskey, and they gave me some, and I had a little bit of whiskey and water in a little bottle for my wife.

A. She was the one who drank it?

A. No, sir. In coming out of Charleston, just where the Summerville road turns out, I made some error in the road, and when I found it out, I turned back, and in putting the brakes on my wife got very nervous, and I gave her a small toddy of whiskey and water to quiet her. I have never been under the influence of whiskey——

Q. Does your wife have those nervous spells very often?

A. Not very often, but quite often.

Q. That is not usually the case with a woman in perfect health? You said she was in perfect health?

A. Physically; yes, sir. She was able to walk and get around. She used to go hunting with me; now she can't do anything.

Q. But you don't ascribe this nervousness to this injury?

A. I do.

Q. Mr. Ford, you were asked that morning to stay on the train and go on to the hospital, were you not?

A. Who was asked that?

Q. You were.

A. No, sir. Nobody ever suggested that; I was just dumped out at this boarding house, without an offer to take me to the infirmary.

Q. Dr. Brockington did that?

[fol. 25] A. He was the physician in charge? No infirmary was ever suggested.

Q. Did he bind up your wound?

A. He fixed it up in such a way that it became infected; it was sewed up without being cleansed.

Q. Do you mean to say that Dr. Brockinton sewed up your wound without its being washed out?

A. Yes, sir. I was laid up one month from it. It became infected. My physician told me that I would have been better off if he hadn't touched it.

Q. What physician is that in Mocksville?

A. Dr. Harding.

Q. Is he here?

A. No, sir. I tried to get him here, but he couldn't come.

Q. Mr. Ford, did you see anybody else around there before you were hit by the locomotive?

A. See anybody else?

Q. Any other cars close to you, coming or going?

A. I don't know whether there was or not. I was looking——

Q. You knew you were going across a railroad track?

A. No, sir; I did not, until I saw the sign, because I was told I turned off at Manning.

Q. You knew the track was there?

A. Yes, sir; I knew the track was there; I looked down the track before I rode on it.

Q. You saw the big sign there for the railroad crossing?

A. Yes, sir.

Q. Then you saw the rails in front of you?

A. Yes, sir.

Q. And drove on it?

A. Yes, of course. I was going over it, and I couldn't cross it without driving on it.

[fol. 26] Q. No, I don't think you could. Mr. Ford, the conductor didn't offer to take you on to Sumter to the hospital?

A. No, sir; positively not.

Q. Nor Dr. Brockington?

A. No, sir; positively not. No assistance offered me beyond the first aid I got in that office, and taking me to that boarding house and leaving me there. Dr. Brockinton said when he was going off, "When you get to Sumter, if you need anything, our doctor there is Doctor So and So."

Q. So you didn't get any assistance, except sewing up dirt in your head?

The Court: Are we trying injuries to both of these parties?

Mr. DuRant: We were just testing out his whole story of this accident? They jury knows Dr. Brockinton.

Q. Now, Mr. Ford, when you had that wreck there, at any rate the railroad men were kind, weren't they?

A. Yes, sir; the first I recall, when I came to, the train was standing there, and the first thing I knew was seeing

this train on the track with a foggy appearance, and there were some people up there talking. I don't remember the train going away. I remember being helped into the automobile; who it was that helped me I don't know. I was taken in the doctor's car to his office in Alcolu, where he treated my head. From there he took me to this boarding house, and there is where he left me.

Q. In other words, the doctor carried you from the scene of the wreck to his office.

A. Yes, sir. And from there to the boarding house, and I employed a car to take me to Sumter. When I left there he was gone. I employed a car to take me to Sumter.

[fol. 27] Q. And the doctor didn't try to get you to go to Sumter on the train?

A. No, sir. The train left before the doctor took me to his office. The train left the wreck before I was carried to the doctor's office. The train left me in the doctor's car.

Q. Does your wife drive about with you often?

A. Yes, sir; a good deal.

Q. What business are you in?

A. In the State Highway, bridge engineering department.

Q. You have to go about a great deal?

A. Of course we move two or three times a year.

Q. I mean riding about?

A. I don't do very much riding, because I am on the work all the time.

Q. Mr. Ford, you went into some particularity, I don't know why, about your course that morning. You came out first on the Summerville road?

A. No, sir. I started out of Charleston, and I started up that road to Summerville. When I discovered my error I put my brakes on so suddenly, and the road being wet, it scared by wife very badly——

Q. Running fast?

A. No, sir; I told you I didn't run over thirty-five.

Q. Then you went up to a barricade up here near Black River somewhere?

A. Yes, sir.

Q. On the Coastal Highway somewhere?

A. Yes, sir; near Kingstree.

Q. How far was the road that you turned in from that barricade?

A. I don't know; I am a stranger here. I judge I came back about a mile to a filling station, where the road turns [fol. 28] out, I understood afterwards that there is a road coming this way from Kingstree. I just took that road looking for a road to Florence.

Q. Running fast or slow?

A. I don't know the exact speed. I know it wasn't over thirty-five miles an hour.

Q. We have a legal rate of forty-five down here.

A. So have we in North Carolina.

Q. And you can move that up all right. You stopped at the filling station and asked the way?

A. No, sir; I saw a car coming, and I asked the man if that was the way to Florence, and he said, "No; you have passed the detour about ten miles, but you can go this way by going through Manning and Alcolu," so I came on this way.

Redirect examination.

By Mr. Davis:

Q. What position have you with the North Carolina Highway Department?

A. Bridge engineer.

Q. Inspecting bridges?

A. Yes, sir; what we call bridge engineering inspector.

Q. Well, in building roads in North Carolina, they cross railroads, do they not?

A. Yes, sir.

Q. In North Carolina——

Mr. DuRant: We object, if your Honor please——

A. We have mostly overhead bridges there——

The Court: One minute——

A. Either an underpass or an overhead——

The Court: Stop when you hear an objection made.

Mr. DuRant: If your Honor please, I don't see the exact relevancy——

Q. Here is what I want to ask you——

[fol. 29] The Court: One minute, one at a time. Isn't that the same question you asked him, Mr. DuRant?

Mr. DuRant: No, sir.

The Court: It may be a little superfluous, but I don't know that it is entirely out of order.

Q. In working and building bridges in North Carolina, do you know the danger of crossing a railroad——

Mr. DuRant: We object, if your Honor please.

The Court: That is a matter or argument.

Q. On this morning, when you were crossing this railroad, you were exercising every care?

A. Yes, sir.

Mr. DuRant: That is a leading question, and a question of law.

Mr. Davis: I withdraw it.

The Court: I think it is a leading question and a question of law.

Joe Rigby (white) was called as a witness on behalf of the plaintiff and, having been duly sworn, testified as follows:

Direct examination.

By Mr. Davis:

Q. Mr. Rigby, where are you working now?

A. In Charleston.

Q. In Charleston. On the 4th of March, 1928, were you living in the town of Manning here?

A. Yes, sir.

Q. Did you go out to the wreck at Trinity Crossing here?

A. Yes, sir.

[fol. 30] Q. How long after the wreck did you go?

A. I guess it was about an hour and a half after the wreck.

Q. Who got you to go out there?

A. Mr. Skit Wideman.

Q. Who else went with you out there?

A. Mr. Mitch Wells.

Q. When you went up there were there many people there?

A. No, sir; just a few people there when I was there.

Q. Did you see the automobile?

A. Yes, sir.

A. I don't know; I am a stranger here. I judge I came back about a mile to a filling station, where the road turns [fol. 28] out, I understood afterwards that there is a road coming this way from Kingstree. I just took that road looking for a road to Florence.

Q. Running fast or slow?

A. I don't know the exact speed. I know it wasn't over thirty-five miles an hour.

Q. We have a legal rate of forty-five down here.

A. So have we in North Carolina.

Q. And you can move that up all right. You stopped at the filling station and asked the way?

A. No, sir; I saw a car coming, and I asked the man if that was the way to Florence, and he said, "No; you have passed the detour about ten miles, but you can go this way by going through Manning and Alcolu," so I came on this way.

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Q. Here is what I want to ask you——

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Mr. DuRant: No, sir.

The Court: It may be a little superfluous, but I don't know that it is entirely out of order.

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A. Yes, sir.

Mr. DuRant: That is a leading question, and a question of law.

Mr. Davis: I withdraw it.

The Court: I think it is a leading question and a question of law.

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Direct examination.

By Mr. Davis:

Q. Mr. Rigby, where are you working now?

A. In Charleston.

Q. In Charleston. On the 4th of March, 1928, were you living in the town of Manning here?

A. Yes, sir.

Q. Did you go out to the wreck at Trinity Crossing here?

A. Yes, sir.

[fol. 30] Q. How long after the wreck did you go?

A. I guess it was about an hour and a half after the wreck.

Q. Who got you to go out there?

A. Mr. Skit Wideman.

Q. Who else went with you out there?

A. Mr. Mitch Wells.

Q. When you went up there were there many people there?

A. No, sir; just a few people there when I was there.

Q. Did you see the automobile?

A. Yes, sir.

Q. How was the automobile turned?

A. Facing the railroad track. It was on the right of the railroad going north, facing the railroad track.

Q. If it was going across the railroad track, it was facing in the opposite direction?

A. Yes, sir.

Q. Where was the car?

A. In the ditch, on the right hand side of the road—the railroad track.

Q. Did you notice about where the car was hit?

A. It was hit somewhere near the rear wheels, I thought.

Q. Near the rear wheels. Had Mr. and Mrs. Ford been moved at the time you got there?

A. Yes, sir; they had been moved.

Q. You say the car was facing back?

A. Yes, sir; turned completely around.

Q. You know nothing about the accident itself?

A. No, sir.

Mr. DuRante: Come down.

[fol. 31] Mrs. KATHERINE FORD (white) was called as a witness on behalf of the plaintiff and, having been duly sworn, testified as follows:

Direct examination.

By Mr. Davis:

Q. Mrs. Ford, I believe you are the plaintiff in this action? You are the one bringing this suit, are you not?

A. Yes, Mr. Davis.

Q. Now, Mrs. Ford, these men over here have got to hear you, so speak out distinctly.

A. I will do the best I can.

Q. Were you with your husband on this trip?

A. I was.

Q. Who were you going to see?

A. My sister.

Q. Before we start—I don't know—my friend has been talking a lot about the fruit jars. Let's get that straightened out first. Tell the Court and jury about those fruit jars?

A. I preserve and can a lot of fruits and vegetables, and on Christmas I usually get a box and fix it up to send to my sister, and that box usually contains fruits and preserves, made with sugar, not alcohol, and those empty jars were being brought back on this occasion.

Q. What size jars were they?

A. They were jars varying from a pint up to a half gallon. Some contained tops and others not.

Q. You had sent fruits, preserves and vegetables in these jars down to your sister?

A. Yes, sir.

Q. And you were taking them back home on this occasion?

A. Yes, sir.

[fol. 32] Q. Any liquor in them?

A. Not that I know of.

Q. You didn't put it there?

A. No, sir.

Q. Your husband didn't put it there——

Mr. DuRant: We object.

Mr. Davis: All right, sir.

Q. Well, now, Mrs. Ford, in driving up the highway that day from Charleston, what kind of morning was it?

A. It was a dreary, drizzly morning.

Q. Did you have your curtains up?

A. We did, Mr. Davis.

Q. You have heard how Mr. Ford missed the road detour, and how he went up to a barricade and came back and took the road through Manning. How fast was he traveling?

A. I know he wasn't traveling fast.

Q. Do you drive a car, yourself?

A. I do not, so, sir.

Q. You were going with your husband back to your home that morning?

A. I was.

Q. Well, now, Mrs. Ford, please tell the jury as near as you can what happened as you drove up to the signs on that crossing?

A. Well, we drove up to this crossing, and seeing this puddle of water and seeing the sign we slowed up. We looked at the sign, and we saw we were headed across the railroad track toward Florence; the sign was pointed that

way. Knowing we were near the railroad track, and along side of the railroad track, we looked back for the train and saw nothing, and then looked at the sign and went on.

Q. Did you look before you crossed the railroad?

A. Sure we did, Mr. Davis.

[fol. 33] Q. Ma'am?

A. I did.

Q. As you were turning, as you looked at the sign, and as you looked down the railroad, did you see any train?

A. I certainly did not, Mr. Davis. The curtains were up, being a rainy, misty morning, I did the best I could to look for trains. It was hard to see.

Q. You knew nothing about the schedules?

A. Absolutely not.

Q. Mrs. Ford, you were not engaged in driving and you could listen pretty well: *y*ere you listening?

A. I surely was.

Q. Did you hear any whistle blow?

A. Positively not.

Q. Did you hear any bell sound?

A. I did not.

Q. Mrs. Ford, if there had been a whistle blown or a bell sounded as you approached that crossing, could you have heard it?

Mr. DuRant: We object; that is not a proper question.

Q. Were you close enough that you could have heard it?

A. Absolutely.

Q. You say you were listening?

A. Yes, sir.

Q. Did you hear any bell?

A. I did not.

Q. Did you hear a whistle?

A. I did not.

Q. If any—was your husband's motor running quietly enough so that you could have heard it?

A. Yes, sir; if a bell had rung or a whistle blown, we could have heard it.

Q. Where was the train when you first saw it?

[fol. 34] A. When I saw it I felt I could have touched it.

Q. What did you do or say when you saw the train?

A. I said "Train," just as Mr. Ford said; then there was nothing else, unconsciousness.

Q. You were knocked unconscious?

A. Absolutely.

Q. When you came to where were you?

A. Sitting on the side of the railroad track, on the railroad bed, as well as I remember.

Q. Was the train there?

A. Yes, sir; it was.

Q. Did you see and recognize your husband?

A. I did. I heard him moaning, and I told the men who were assisting me to turn me loose and to go to my husband. They pulled him up and blood was streaming from his face.

Q. Were the doors shut on your car?

A. Yes, sir.

Q. Curtains up?

A. Yes, sir.

Q. Do you know how you went out of the car?

A. No, sir, Mr. Davis, I don't know.

Q. Don't know how you got out?

A. No, sir.

Q. How did you get away from the wreck?

A. There was a car, Mr. Davis, that took us away from the wreck, but at the time we were being taken from the wreck I didn't know it was a doctor; I just thought it was some car. There were a lot of cars there. They took us to where we could get first aid.

Q. Somebody in a car took you away from there?

A. Yes, sir.

Q. Do you know anything about being asked to go to the hospital on the train?

[fol. 35] A. No, sir, nothing. They took us to this little office; it was very little——

Q. You went from there to Sumter, and from Sumter you went to Mocksville?

A. Yes, sir.

Q. Did you have to stop in Sumter?

A. Indeed I did; so much pain there was nothing else to do; couldn't do anything else.

Q. I believe you stayed a couple of days, then you went to Mocksville?

A. Yes, sir.

Q. Who treated you there?

A. Dr. Harding.

Q. Were you taken to a hospital, or to your home?
A. Taken to my home.
Q. Did you have a trained nurse?
A. I did, it was absolutely necessary that I have one.
Q. Before this injury, could you do your own housework?
A. Yes, indeed; I was a very active woman.
Q. This nervousness that your husband was talking about——

Mr. DuRant: We object; that is leading.
The Court: Yes, that is leading.

Q. You say you did your work before?
A. Yes, sir, I did, and because of this accident I am unable now to do my work.
Q. Did the doctor come to see you at your home?
A. Twice a day for four weeks, then down to once a day, and then finally down to once a week.
Q. How long were you in bed altogether?
A. I was in bed four weeks.
Q. Well, Mr. Ford, during the time you were in bed after [fol. 36] the accident, did you suffer any?
A. Indeed I did——
Q. Just describe to the jury your suffering?
A. I have suffered tortures because of the injury to my knee.
Q. Describe where you were hurt?
A. Well, I was injured at the knee; there was a separation of the bones at this knee, which involved the ligaments, which were lacerated and torn. For that reason I was confined to a crutch, and the doctor said I was injured for the balance of my life.

Mr. DuRant: We object.
The Court: Yes, don't tell what the doctor told you.
Mr. Davis: Isn't that competent, if your Honor please——
Mr. DuRant: We withdraw the objection. That is Dr. Harding?
Mr. Davis: Yes, sir.
The Witness: I can also tell by my feeling——

Q. As a result of the injury to that leg, can you use it?
A. No, sir; I can't without the aid of a crutch; neuritis has developed and paralysis.

Q. Could you sleep?

A. No, indeed. For a long time I had to have dope so that I could sleep. There are times now that I have to take bromide.

Q. And you say you are suffering intensely?

A. Intensely.

Q. Do you know what was the cause of your illness after you left home?

Mr. DuRant: We object; that is not an element of damage.

The Court: You haven't alleged that, Mr. Davis.

[fol. 37] Mr. DuRant: And we object to all that about the doctor and the trained nurse, if it is for that purpose.

Mr. Davis: Just describing the situation, if your Honor please.

Mr. DuRant: No objection then.

Cross-examination.

By Mr. DuRant:

Q. Mrs. Ford, as I understand, you saw the railroad crossing and looked for the train?

A. Yes, sir.

Q. And couldn't see it?

A. We did not.

Q. And you say the doctor dumped you out at the boarding house in Alcolu?

A. He most positively did, yes sir. We were not even comfortable, Mr. DuRant: There was no fire. The fire was allowed to go out, and there we were, victims of this accident, dumped out there without even comforts.

Q. The hotel people wouldn't give you a fire?

A. We asked for a fire and it never did burn until——

Q. You never did *n*et warm?

A. No, sir. Mr. Ford's coat was wet, and he had to take it out into the kitchen or some other room to dry it.

Q. You didn't call the attention of the hotel people to your plight?

A. We most positively did.

Q. They didn't show you proper courtesies?

A. No, sir. I suppose that in their opinion they did. They came in and stirred the fire up, but it looks like they would have made some special effort——

Q. About what time did you leave there?

A. It was between four and five in the afternoon.

Q. You went where?

[fol. 38] A. Went to Sumter to a hotel.

Q. What hotel?

A. I don't remember the name of the hotel.

Q. Where was it located? The one right across from the station?

A. I couldn't tell you that, because——

Q. The hotel you went to, you stayed there until you left Sumter?

A. Yes, indeed. Couldn't move.

Q. You went directly to that hotel and stayed there?

A. Yes, sir.

Q. How long did you stay there?

A. It was fully three days before I could be moved.

Q. On what day did this occur?

A. Sunday morning.

Q. When did you leave there?

A. I imagine on Wednesday.

Q. On the morning or night train?

A. I don't remember.

Q. You don't remember whether it was morning or night?

A. I think it was the night train. I was in such condition, I was doped up, so I couldn't be positive.

Q. What do you mean by doped?

A. I mean that it was necessary to give me a hypodermic to ease my pain, I was suffering so.

Q. Mrs. Ford, don't you think you could have seen this train if you hadn't been under the influence of whiskey?

A. No, sir; I never use whiskey.

Q. So that morning you looked and couldn't see it?

A. Yes, sir; looked and couldn't see it. It was a dark morning, and the curtains were up——

Q. Those curtains have windows in them, don't they?

A. Yes, sir.

[fol. 39] Q. Of course, you knew the danger of going on a railroad track?

A. Yes, sir.

Q. Of course you looked?

A. The best I could.

Q. When you did see the train you were close enough to put your hand on it?

A. To put my hand on it.
Q. And you never did hear it?
A. Never did hear it.

Redirect examination.

By Mr. Davis:

Q. Did they ring that bell——

Mr. DuRant: We object, if your Honor please; that is not in reply. He has asked all that.

The Court: You have asked that, Mr. Davis. Under the rule you are confined to new matter.

Mr. DuRant: And it is for the jury to say whether a person can hear a train within six feet of them.

Q. You say you looked?
A. I did, Mr. Davis, and I couldn't see anything and couldn't hear anything.

Mr. DuRant: We object——

The Court: That is a matter you have been into in chief, Mr. Davis.

Q. Before you come down—I don't know the relevancy of it, but my friend here—was your husband's wound infected?
A. It was.

Mr. DuRant: We object, if your Honor please—I don't care though; withdraw the objection.

Q. Were you present when it was dressed in Mockville?
A. I was in bed. We had a trained nurse who looked [fol. 40] after the——

The Court: Mr. Davis, I can't see the relevancy of all that.

Mr. Davis: I don't know either.

Recross-Examination.

By Mr. DuRant:

Q. You were present when your husband's wound was dressed by the doctor?
A. Yes, sir.
Q. At Alcolu?

A. Yes, sir; but I was dazed.

Q. You could see what was going on?

A. Yes, sir; but I was in such condition—the doctor couldn't distinguish which one of us was hurt most. I suggested to him to dress my husband's first.

Q. You were standing there when he dressed your husband's wound?

A. No, sir; I wasn't right there. There was some man employed to assist him.

Q. Did you see the doctor dress that wound?

A. Yes, sir.

Q. You were looking at him?

A. No, sir; I wasn't—he was covered with blood——

Q. You could see how he was dressing it?

A. I could see——

The Court: I can't see the relevancy of this to save my life, all this evidence about Mr. Ford's head being busted——

Mr. DuRant: They brought it out.

The Court: Well, I don't care who brought it out, I am going to rule it out from now on.

[fol. 41] Redirect examination.

By Mr. Davis:

Q. Do you know whether you left the place of the accident on the train or in a car?

A. In a car.

Q. You think you did?

A. I know I did.

Q. Or did you leave the railroad station in the doctor's car?

Mr. DuRant: We object to his leading the witness.

Q. Are you sure about it?

A. I am absolutely sure that we left in the doctor's car.

The Court: Now, if I were you I would get down before they get at you again.

Benny Berry (white) was called as a witness on behalf of the plaintiff and, having been duly sworn, testified as follows:

Direct examination.

By Mr. Davis:

Q. Mr. Berry, how far do you live from the place of this accident?

A. It is about six hundred or six hundred and fifty yards, I reckon, something like that.

Q. Do you remember the morning of the accident last March, a year ago?

A. Yes, sir.

Q. Where were you standing, Mr. Berry, at the time the train passed?

A. On the porch.

Q. On your porch?

A. Yes, sir.

[fol. 42] Q. Now, as they got to the—how far is that post, at which they were supposed to blow the whistle——

A. From my house?

Q. From your house?

A. About, I reckon, 150 or 200 yards, something like that.

Q. Well, now when the train got to that point, did you hear a blast from the whistle?

A. Yes, sir.

Q. Now, Mr. Berry, after that blast there——

Mr. DuRant: If your Honor please, it strikes me he is leading the witness a very great deal.

Mr. Davis: He said he heard a blast.

Q. Did you hear the whistle blow at the post?

A. Yes, sir.

Q. Did they continue blowing until it got to the crossing?

A. They blowed two longs and two shorts, regular crossing blow. Of course he started blowing right at the post, but how long it continued I don't know.

Q. Were they blowing at the crossing?

A. No, sir; I don't think they were blowing right at the crossing.

Q. What was the next thing you heard after you heard the two long blows and the short blows, I believe you said?

A. I heard the lick.

Q. The crash?

A. I heard the lick.

Q. You heard the lick?
A. Yes, sir.
Q. Did you go up there?
A. Yes, sir.
Q. What did you see there?
[fol. 43] A. When I got there there was a good many people around there. About the first thing I noticed—the train had already started backing up; they blew the back-up signal and backed up, and the rear of the train was just a few feet from the crossing—and two men were holding Mr. Ford up at the back of the train. He didn't seem to know anything. He was asking about his car. Mrs. Ford was lying at the edge of the ditch with her feet in the ditch. A couple of ladies got off the train and helped pick her up out of the ditch.

Q. Mr. Berry, they have it in their minds that they left that place in the doctor's car——

Mr. DuRant: If your Honor please, we must object to his leading his witness. He is detailing to this witness what another of his witnesses said.

The Court: I think he can ask this witness how they went away.

Q. How did they go, Mr. Berry?
A. They were put on the train.
Q. Where were they put off at?
A. At Alcolu.
Q. How did they go to the boarding house?
A. They left the depot in the doctor's car.
Q. Dr. Brockinton's car?
A. Yes, sir.
Q. That is the first time they got in the car?
A. Yes, sir.
Q. How was the automobile after the lick, Mr. Berry? How was the automobile placed or lying after that?
A. The car was on the right side of the railroad track, and on the left side of the highway, just kind of in the corner like, and it had been turned, just exactly changed ends with it, just reversed it back from the way in which it was going. It looked as if the engine, that engine struck [fol. 44] the left hind wheel and just spun it around.
Q. Were the curtains up when you got there?

A. Yes, sir. The curtains were torn up some.
Q. After the accident?
A. Yes, sir.

Cross-examination.

By Mr. DuRant:

Q. Mr. Berry, Mrs. Ford said she was absolutely sure that she left the scene of the wreck on the automobile. They left there on the train?
A. Yes, sir.
Q. So you contradict her on that.

Mr. Davis: Must have been unconscious.
Mr. DuRant: I am examining the witness, your Honor. Mr. Berry, you drank some of the liquor, the fluid out of the bottle, I understand?

A. I tasted it; yes, sir.
Q. Took a big drink out of it?
A. No, sir; I tasted it.
Q. What was it?
A. It was mixed. Had some whiskey in it.
Q. You pronounced it good whiskey, I believe?
A. I tried——

Redirect examination.

By Mr. Davis:

Q. What kind of little bottle was that in?
A. A little bottle; might have been a catsup bottle.
Q. You heard Mr. Ford describe it?
A. Yes, sir. Lee Howard got the bottle out of the ditch; they were raking in the ditch.
Q. That wasn't broken?
A. No, sir.
Q. Take these jars, did you smell them?
[fol. 45] A. I saw some jars.
Q. Any liquor about them, that you saw?
A. No, sir; I never saw any liquor.

Recross-examination.

By Mr. DuRant:

Q. You mean to say you didn't see any liquor in the broken jars?
A. No, sir.

Redirect examination.

By Mr. Davis:

Q. Was any on the ground?
A. No, sir; I didn't see any on the ground.

R. E. THOMPSON (white) was called as a witness on behalf of the plaintiff and, having been duly sworn, testified as follows:

Direct examination.

By Mr. Davis:

Q. Mr. Thompson, how far do you live from this railroad crossing that we are talking about?
A. Nine-tenths of a mile.
Q. Mighty near a mile. On the morning of this accident, at the time the train was passing there, approaching that crossing, where were you?
A. In my back yard at home.
Q. Did you hear the train coming?
A. Yes, sir.
Q. How many times before it got to the crossing did you hear it blow?
A. I only remember once, sir.
[fol. 46] Q. Only once. What was the next thing after that blow that you heard?
A. I heard a fuss.
Q. You mean a lick?
A. Yes, sir. It attracted my attention, and in a few minutes the train continued to blow.
Q. There was some fancy blowing done backing up?
A. Yes, sir.
Q. After they passed across there backing up——

Mr. DuRant: We object to his continually leading the witness.

The Court: Don't lead him, Mr. Davis.

Q. You went down there?

A. Yes, sir.

Q. What did you find when you got there?

A. I found where the car was wrecked, pointed about forty-five degrees towards Alcolu, over in a ditch.

Q. That crossing is a regularly traveled crossing?

A. Yes, sir.

Q. Route Number 4?

A. Yes, sir.

Q. A good many cars travel that road?

A. Yes, sir.

Q. How about Number 26, leading to Sumter?

A. More traveled.

Q. You were in your back yard. Was or not there any continuous blowing of that whistle from that post down there? Did it continue to blow——

Mr. DuRant: We object, if your Honor please, he was nine-tenths of a mile away.

The Court: I don't think he can tell anything more than what he heard. Ask him what he heard with reference to the blowing of the whistle before he heard the crash?

[fol. 47] Q. Before you heard the crash, Mr. Thompson, what did you hear as to signals?

A. Well, sir, I heard the train blow just before it passed.

Q. The next thing you heard was what?

A. The fuss at the crossing.

Q. You say that was one time? You heard it blow once?

A. Yes, sir.

Q. Were you close enough to have heard it blow more if it had blown?

A. If I was paying attention I could.

Q. Did you get there before the plaintiff left?

A. Yes, sir.

Q. Give us your recollection of how they left?

A. My recollection is they went off on the train. The train was there doing all they could for them, it seemed.

Q. You were there when they were taken up and put on the train?

A. Yes, sir; I think they went on the train.

Mr. DuRant: Come down.

J. B. Pope (white) was called as a witness on behalf of the plaintiff and, having been sworn, testified as follows:

Direct examination.

By Mr. Davis:

Q. Mr. Pope, where were you on the morning of this accident?

A. At my house.

Q. How far from the crossing?

[fol. 48] **A. About 300 yards.**

Q. You were on route Number 4, further up on next Mr. Early Thompson's?

A. Yes, sir.

Q. Were you on the piazza, or in the yard?

A. Sitting inside the house.

Q. Now, on the morning of this wreck, did you hear the train as it approached that crossing?

A. Yes, sir.

Q. Did it—what did you hear if anything?

A. Well, I heard the train roaring, next thing I heard a big lamentation at the crossing. I told my wife——

The Court: Don't tell what you told your wife.

Q. Did you hear any blowing at all?

A. Not until they were backing up.

Q. Did you hear the lick as the train struck the car?

A. Yes, sir.

Q. You heard that, but you heard no blowing. Then you went down there?

A. Yes, sir.

Q. What did you find?

A. I found an automobile in the ditch, torn all to pieces, and some old scattered jars around there and so on.

Q. Were Mr. and Mrs. Ford taken out of the ditch when you got there?

A. Yes, sir, they had gone.

Q. How did they go?

A. They had done gone off on the train, so some of the fellows there said; I didn't see them.

Q. After the lick, and the train was backing up you say you heard blowing?

A. Yes, sir.

Q. Heard plenty of it.

[fol. 49] Cross-examination.

By Mr. DuRant:

Q. Mr. Pope, how far is your house from highway Number 4?

A. I guess it is forty or fifty yards.

Q. Which side, towards the Sumter side?

A. Yes, sir.

Q. And about 300 yards from the railroad track?

A. Yes, sir; something like that. I don't know exactly, but I just judge that.

Q. Woods between?

A. No, sir; just one little streak of woods.

Q. But there is a streak of woods?

A. Oh, yes, sir.

Q. Well, you must have stayed there and waited a good while about going down?

A. I had to walk down there. It was raining and my automobile had drowned out.

Q. You tried to start and it wouldn't start?

A. Yes, sir.

Q. You were inside the house when you heard the train?

A. Yes, sir.

Q. Windows open?

A. Yes, sir; a window and door open next the railroad.

Q. Did you have a fire?

A. I don't remember whether we had a fire or not; the stove might have been fired up.

Q. Mr. Pope, you gave a statement to the railroad agent on this matter, didn't you?

A. Why, I couldn't tell you, sir; I don't know the railroad agent.

Q. Right there, sitting right behind Mr. Davis, Mr. Cothran (indicating)?

[fol. 50] A. I didn't know who he was.

Q. You signed that, didn't you (handing paper to witness)?

A. Yes, sir; that is my handwriting; that is my signature; yes, sir; that is my signature.

Q. Look over that and refresh your memory as to what you signed. That was signed three days after the accident, on March 7th; the accident occurred on March 4th. In that

you say there, "I was sitting at the table." That's right, you were sitting at the table?

A. Yes, sir.

Q. "I heard the train blow the regular crossing blow." That right?

A. Yes, sir.

Q. "A little later I heard the crash, but didn't know what it was."

A. Yes, sir; that is what I said just a few minutes ago; I heard the fuss down there.

Q. You say here, "I heard the train blow the regular crossing blow."

A. I didn't read that; I didn't know what it was; I didn't know what I——

Q. You signed that?

A. Yes, sir; but I didn't know what I was putting my fist to.

Q. After refreshing your memory, didn't you hear the train blow the regular crossing blow, and a little after that you heard the crash?

A. I did, I heard the crash, but I couldn't say point blank whether I heard the crossing blow or not.

Q. You just won't say either way?

A. No, sir.

Q. You admit signing this three days after, in which you stated that you did hear the train blow the regular [fol. 51] **crossing blow? You signed that?**

A. Yes, sir.

Q. Now, you don't remember whether you heard the train blow the crossing blow or not?

A. No, sir; I won't say point blank either way.

Q. Won't say either way, all right?

OFFER IN EVIDENCE

Mr. Davis: I offer in evidence, if your Honor please, under our agreement, the statement of Dr. Harding.

The Court: Very well, publish it.

October 28, 1929.

Judge Superior Court, Manning, S. C.

DEAR SIR: This is to certify that I attended Mrs. George G. Ford in March and April, 1928, for injuries.

I found that she had injury to knee, with separation of upper extremities of tibula and fibula; ligaments lacerated and articulation of bones dislocated.

Mrs. Ford was confined to bed for four weeks under my care and treatment, during which time she suffered a great deal of pain. I have observed her since that time. She has suffered continuously from this injury, and is now suffering from a neuritis and partial paralysis of this leg due to said injury.

In my opinion Mrs. Ford is permanently injured.

Yours very truly, S. A. Harding, M. D.

[fol. 52] Geo. G. Ford was recalled as a witness on behalf of the plaintiff and testified as follows:

Direct examination.

By Mr. Davis:

Q. Mr. Ford, the Atlantic Coast Line Railroad runs through North Carolina, does it not?

A. Yes, sir.

Q. In March of 1928, do you know, can you give the jury what a crossing blow was?

A. Two dashes and two dots.

Mr. DuRant: One minute, if your Honor please——

Q. Do you know——

A. Yes, sir.

Mr. DuRant: —this witness is not an expert.

Q. You listen at them, do you——

Mr. DuRant: And I don't see the purport of this evidence.

The Court: He says he knows, if he knows he can tell.

Mr. Henry E. Davis: Understand, your Honor, the blows are regulated by the written rules of the railroad company; how in the world could he know.

The Court: I can't say he doesn't know.

Mr. DuRant: We object to this witness testifying on this in this way. He has not qualified as an expert, and we think before it comes in, he should state the source of his

knowledge, and then the Court could judge as to whether it is irrelevant or incompetent. In other words, as to how he arrived at his information, more basis should be laid as to that. In the second place, he is testifying as to North Carolina; I don't know that it is the same in North Carolina as it is here.

Q. State the source of your information?

The Court: The witness has said that he knows; if he [fol. 53] knows, then he can state it. You can cross-examine him and test him afterwards, whether he knows or not, but if he says he does know what it is, it is not for me to say that he does not know. It is not such a question that requires an expert.

Q. Give the source of your information, Mr. Ford?

A. Because I ran a locomotive and was master mechanic on the Georgia Southern Railroad. I passed examinations under the train master of the Southern and Coast Line in Charleston and Savannah, and on the South end, the J. T. & P. W., I ran a locomotive, and on the Savannah division of the Southern as engineer between Columbia and Savannah.

Q. When, Mr. Ford? How long ago?

A. In 1903, under P. I. Wells, Columbia, South Carolina, I ran train No. 73 and 76——

Mr. DuRant: Twenty-six years ago, if your Honor please.

The Court: You can show any change.

The Witness: I had to pass the examination under Mr. Porter, the train master, in Charleston.

Q. What was the station blow—the crossing blow on March 4th, 1928, when you were injured?

A. Two longs and two shorts, boooo-boooo—boo-boo.

Q. Is it that now?

A. It is booooo-boooo—boo-booooo. That last note is held until it crosses the crossing.

Q. It has been changed since March 4th of last year?

A. Yes, sir.

Mr. DuRant: No questions.

Mr. Davis: That is the plaintiff's case, if your Honor please.

[fol. 54] **A. L. Ervin (white) was called as a witness on behalf of the defendants and, having been duly sworn, testified as follows:**

Direct examination.

By Mr. DuRant:

Q. Is this Mr. A. L. Ervin?
A. Yes, sir.
Q. What is your business, Mr. Ervin?
A. Civil engineer.
Q. How long have you been a civil engineer?
A. Since 1907.
Q. Whom are you employed with now?
A. In business for myself.
Q. Where at?
A. At Florence, South Carolina.
Q. Did you make a survey and map of the Coast Line over here in Routes 4 and 26, near Manning?
A. Yes, sir.
Q. This is marked March 6th; is that the time you made that survey of that place?
A. Yes, sir.
Q. Is that the result of that survey (handing paper to witness)?
A. Yes, sir.
Q. Is that drawn to scale?
A. Yes, sir; twenty feet to the inch.
Q. Twenty feet to the inch?
A. Wait one minute, one inch equals forty feet.
Q. Forty feet to the inch?
A. Yes, sir.

Mr. DuRant: We offer this in evidence, if your Honor please.

Mr. Davis: No objection.

[fol. 55] (Paper above referred to introduced in evidence and marked "Exhibit 8.")

Q. Mr. Ervin, on that have you got marked there the road signs, the direction signs, the arrow pointing towards Florence?
A. Yes, sir.

Q. Mr. Ervin, what is the distance from the road direction signs, highway signs, on Route 4, to the railroad track?

A. It is sixty feet from the edge of the pavement to the center of the railroad.

Q. Sixty feet from the edge of the pavement on Route 26 to the center of the railroad?

A. Yes, sir; the sign itself is just about five feet to the right of the pavement. From the sign to the track, to the first rail would be right about fifty-four feet.

Mr. DuRant (to the jury): Would you like to have him explain this to you?

A Juror: I think I understand it better than that could do.

Cross-examination.

By Mr. Davis:

Q. Mr. Ervin, that map doesn't show the curve just beyond the whistle post?

A. The curve is this way from the whistle post.

Q. Yes, sir; just beyond it, away from the crossing, it doesn't show that curve?

Redirect examination.

By Mr. DuRant:

Q. How far is that curve?

A. It is about a half mile, or three quarters, somewhere along there; I didn't measure it. I measured only down the track a distance of 1700 feet.

[fol. 56] Q. Does the road follow the railroad side by side as you come out of black river swamp, around the curve and all?

Recross-examination.

By Mr. Davis:

Q. The whistle post is how far from the crossing?

A. 1500 feet.

Q. 500 yards?

A. Yes sir.

C. L. WALTERS (white) was called as a witness on behalf of the defendants and, having been duly sworn, testified as follows:

Direct examination.

By Mr. DuRant:

Q. Mr. Walters, on March 4th, 1928, when this accident occurred, where were you?

A. I was between here and Alcolu, on my way to Camden.

Q. Going from where?

A. My home at Bonneau.

Q. Have you any connection with the Atlantic Coast Line Railroad Company?

A. Work for them?

Q. Yes, sir.

A. No, sir; I work for——

Q. Where did the train pass you that morning?

A. The train passed by at that first crossing just across the swamp.

Q. Was it running faster than you?

A. Yes, sir.

Q. And it went on?

[fol. 57] A. Yes, sir.

Q. How about the crossing signals?

A. He blowed for this one, and he blowed again after he passed me. I couldn't tell you how far he was from the other crossing.

Q. There are two crossings along there?

A. Yes, sir.

Q. You heard it blow for both?

A. I heard him blow for this one, and he was ahead of me when I heard him blow the second blow.

Q. Were you running fast or slow?

A. About twenty or twenty-five miles an hour.

Q. Do you know anything about the Buick car Mr. Ford was in?

A. No, sir.

Q. Could you hear it plainly? The train?

A. Yes, sir; it went on by me.

Q. Could you hear it?

A. Yes, sir; it is generally loud on a damp morning;

sounds louder than on a dry morning, and on the swamp, too, makes it sound a little louder.

Cross-examination.

By Mr. Davis:

Q. Where were you when you first heard it?

A. In the swamp. We got to this first crossing just beyond the swamp about the same time.

Q. You say you heard them blow?

A. Yes, sir; he blowed.

Q. You heard it?

A. Yes, sir; he blowed for that crossing.

Q. What kind of a blow, Mr. Walters?

A. He blowed two longs and two shorts. The last short was a little longer than the first one.

[fol. 58] Q. Do you live near the railroad now?

A. Yes, sir; about a hundred yards.

Q. Is the blow now for a crossing different from what it was at that time?

A. It seems to me the last blow now is a little longer now.

Q. They are longer now?

A. Yes, sir.

L. C. Spigner (white) was called as a witness on behalf of the defendants and, having been duly sworn, testified as follows:

Direct examination.

By Mr. DuRant:

Q. Mr. Spigner, do you know when this wreck happened in March of last year?

A. Yes, sir.

Q. That morning what did you do? Were you anywhere near where the wreck took place?

A. I was coming along on the other side of the railroad.

Q. You were coming toward Route 26 on Number 4?

A. Yes, sir.

Q. When you got down close to the railroad what did you hear?

A. I heard the signal of the train, and I stopped for it to pass on off.

Q. The train was blowing?

A. Yes, sir; it gave the signal.

Q. Blew the crossing signal?

A. Yes, sir.

Q. What did you see ahead of you, if anything?

A. I saw a Buick car ahead of me. He stopped, I sup- [fol. 59] pose he stopped, looked like he was waiting, then he pulled in gear again and drove on off about ten miles an hour.

Q. Drove in front of the train?

A. Yes, sir.

Q. Could you see the car he was in plainly?

A. Yes, sir.

Q. Could you see the train down there coming?

A. I seen it when it got within fifty or seventy-five yards. I was on the woods side, and when it got within fifty or seventy-five yards, I could see it.

Q. After the woods got out of your way, you could see it all right?

A. Yes, sir.

Q. Was the train on time that morning?

A. I think it was; I am not certain.

Q. You live at Alcolu?

A. Yes, sir.

Q. You know about what time it comes by every morning?

A. Yes, sir.

Q. Was there any obstruction, or any reason why he could not see the train?

Mr. Davis: Of your own knowledge. Better let him describe the situation.

A. It was misting rain; a little foggy——

Q. Was that enough to keep you from seeing the train?

A. Not at the distance I could see, there wasn't.

Q. Was there any obstruction on his side to keep him from seeing.

A. No, sir.

Q. Wide open for a mile?

A. I would say three-quarters of a mile.

[fol. 60] Cross-examination.

By Mr. Davis:

Q. Down the road, towards Manning, there is a curve, Mr. Spigner?

A. Yes, sir.

Q. You say it was a rainy, foggy morning?

A. Yes, sir.

Q. Did this car have the curtains up?

A. Yes, sir.

Q. Did you have your curtains up or not that morning?

A. Yes, sir.

Q. You had your curtains up?

A. Yes, sir.

Q. You heard the train?

A. Yes, sir.

Q. You are familiar with the situation there, are you not, Mr. Spigner, travel it frequently?

A. Yes, sir; travel it a good bit.

Q. You know the time the train gets there and all?

A. Yes, sir.

Q. You say you heard them blow the signal blow?

A. Well, it blowed; I don't know the signal, but I know it blowed.

Q. That was down the road a piece?

A. Yes, sir.

Q. Down the road.

A. Yes, sir.

G. P. Kolb (white) was called as a witness on behalf of the defendants and, having been duly sworn, testified as follows:

Direct examination.

By Mr. DuRant:

Q. Mr. Kolb, were you with Mr. Spigner, who had just [fol. 61] been on the stand, that morning?

A. Yes, sir; I was with him in the car.

Q. Mr. Kolb, tell what happened?

A. Well, I was just along there with him, he was driving; I wasn't paying any attention. I heard the train blow.

I took my eyes off it; I was looking at the car standing in the road. He stopped as well as I could see, and he started, then I looked at the train, and it was so close I said, "It got it."

Q. That is about sixty feet from the track where he stopped?

A. Yes, sir.

Q. In coming on, at what speed did he come on it?

A. I reckon about ten or fifteen miles an hour; pretty slow.

Q. Was the car in high gear or intermediate?

A. I couldn't tell you about that.

Q. After it stopped did you see whether it was or not?

A. No, sir; I didn't see whether it was in low gear or not. I looked and it looked like it was in second gear.

Q. In starting was he just about the distance a man would be in second gear?

A. Yes, sir; it looked just about in that distance.

Q. Did you go down there to the wreck?

A. Yes, sir.

Q. When you got there, what did you see?

A. Well, I saw the lady sitting up on the bank. She said, "Take my husband out of the ditch, he is drowning," and I got down and lifted his head up on the bank, and then I left, didn't have no more to do with it.

Cross-examination.

By Mr. Davis:

Q. Mr. Kolb, it was a cloudy, rainy morning, was it not?

[fol. 62] A. Yes, sir.

Q. You remember how yesterday morning looked?

A. Yes, sir.

Q. Was that about the kind of morning it was?

A. Yes, sir; just about, except it was drizzling rain.

Q. It is much harder to see on that kind of a morning, is it not? From where you were sitting, could you see the people in the car, or did you just see the car?

A. I just saw the car; I didn't——

Q. And you say, as they turned around from Route No. 26, going to Sumter, as they turned around there, they almost stopped the car?

A. As far as I could see, it looked as if they almost stopped.

Q. At that time you don't know how far the train was away?

A. No, sir.

Q. By the time they got from that sign to the track, the train had come down there from wherever it was?

A. Yes, sir.

Q. After a lick like that, Mr. Kolb, by the train on the car, you would not be able—you would not be willing to say that a car was in any particular gear that it was before?

A. No, sir; I said it looked like——

Q. I say, you couldn't tell, with a car in a wreck like that, in what gear it was before?

A. Yes, sir; couldn't tell.

Q. They were not speeding across the track, were they?

A. Not as I could tell; they were not making no break-neck speed.

Q. Did they appear to you, before they were hit, and while they were near the sign, as if they were acting [fol. 63] cautiously and carefully before they were hit?

A. I couldn't tell much about the real distance; they just looked as if they were reading the signs to see where they were going.

Q. And they had slowed up to do that.

Redirect examination.

By Mr. DuRant:

Q. You stopped on one side and they stopped on the other?

A. Yes, sir.

Q. You didn't go on and they did?

A. Yes, sir.

Q. You were sober that morning?

A. Yes, sir.

Recross-examination.

By Mr. Davis:

Q. You don't pretend to say the others were not, do you Mr. Kolb?

A. No, sir; I do not. I don't know anything about that.

W. M. SMITH (white) was called as a witness on behalf of the defendants and, having been duly sworn, testified as follows:

Direct examination.

By Mr. DuRant:

Q. Mr. Smith, what is your age?
A. Seventy-one.
Q. What is your business?
A. I haven't got any right now. I have been locomotive engineer all my life up until a year ago.
Q. How long had you run an engine?
[fol. 64] A. About forty-five years.
Q. Retired now?
A. Yes, sir; retired, yes, sir.
Q. Now, on this morning of March 4th, were you running on this train from Charleston to Greenville?
A. Yes, sir.
Q. You just ran to Columbia, didn't you?
A. Only to Columbia; yes sir.
Q. How long had you been on that run?
A. About nine years.
Q. Nine years continuously. You were familiar with the road?
A. Yes, sir.
Q. Tell us about that accident. Which side of the engine do you sit on?
A. The right hand side.
Q. This car—it is in evidence that this automobile approached from the left side?
A. Yes, sir.
Q. When was the first time you saw it?
A. Didn't see it at all until after it had been struck.
Q. Not until after it had been struck. Is there a whistle post down there?
A. Yes, sir.
Q. Did you sound your whistle——
A. Yes, sir.
Q. —when you reached the post. You sounded the whistle; what else did you do?

A. I turned the air on the bell ringer right before I started blowing the whistle.

Q. When you saw that you had struck them, what did you do?

A. Put the brakes on and stopped.

Q. And backed up?

[fol. 65] A. After they found something the matter behind they signed me back.

Q. How far back did you go?

A. About six car lengths.

Q. How fast were you running?

A. Between thirty and thirty-five.

Q. Between thirty and thirty-five miles an hour?

A. Yes, sir.

Q. Is that your usual gait along there?

A. That is the speed provided I was on time.

Q. Were you on time on that day?

A. Yes, sir.

Q. What time were you due there?

A. I don't remember the schedule, but it was about nine-thirty when that happened.

Cross-examination.

By Mr. Davis:

Q. Mr. Smith, I believe your plat here, that counsel has introduced in evidence, shows a straight track there for about a mile?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. And the highway runs right along by the side of that railroad, doesn't it?

A. On the left hand side of the railroad; yes, sir.

Q. That car, you say, you didn't see it at all?

A. No, sir.

Q. Well, then, you didn't keep a lookout?

A. Nothing surprising about it.

Q. It is to me.

A. I am supposed to look up the track, not up the county road. If I was looking over there, I couldn't look in front [fol. 66] of me.

Q. If you were looking out, why didn't you see these people?

A. The boiler was between me and the county road.

Q. You don't pay any attention to the side roads?

A. No, sir; not on that——

Q. You say you couldn't see these people?

A. I couldn't see over that side without neglecting my business.

Q. Didn't you have a fireman?

A. That ain't me.

Q. He is under your direction, isn't he?

A. When I want anything done, yes.

Q. Isn't he supposed to keep a lookout?

A. Yes, sir; when he is not working.

Q. If he is shoveling coal he can't look out?

A. He can't be.

Q. So, when he is shoveling coal and you approach a crossing, people on his side of the road have got to look out for themselves?

A. They should do it.

Q. You don't pay any attention to them?

A. I can't pay attention to them and attend to my business.

Q. Your fireman didn't report to you that there was somebody on that side?

A. No, sir.

Q. You didn't see anything of that car, although it was right there turning across that track, until you hit him?

A. I couldn't possibly see the man without getting off my side and going over on the fireman's side, and I am not supposed to do that; couldn't do it.

Q. You blew the signal at the post?

A. Yes, sir.

[fol. 67] Q. Where is the post?

A. Right along side of the track, on my side of the road.

Q. You say you did what with the bell after you blew the whistle?

A. I told you I turned on the bell ringer before I blew the whistle. The bell rings with air. There is a little value there like a water spigot in a kitchen, and you turn that to ring the bell.

Q. What was the matter with that bell that morning?

A. Nothing that I know of.

Q. Everybody says they never heard the bell ring.

A. I ain't supposed to——

Q. But you said it was ringing when you crossed the crossing.

A. No, sir; I didn't say that.

Q. I thought you said that.

A. No, sir; I didn't say that. You asked me——

Q. Was it ringing when you crossed the crossing?

A. I suppose it was. I don't have time to pay particular attention to everything—every little thing like that.

Q. Those little details don't concern you?

A. No, sir; I turned it on, and it rings itself. I couldn't swear it was ringing, with the fuss of the engine.

Q. You don't know whether it was ringing or not?

A. No, sir.

Q. And you didn't see these people ahead of you?

A. I didn't understand you.

Q. I say, you didn't see this Buick car ahead of you on the highway?

A. I heard a noise and looked and saw the car down by the track.

Q. You mean before it was struck?

A. No, sir; the engine was between me and the car. [fol. 68] Wasn't no obstructions between the railroad and the county road, though not a brush or anything.

Q. There is a railroad sign there, isn't there?

A. No trees.

Q. A railroad sign there, or your map is wrong.

A. Ain't anything in between there at all, not a bush or tree.

Q. Down this way I am talking about (indicating). Down at this edge of the railroad (indicating). Isn't there a railroad sign there?

A. Yes, sir; for the railroad crossin-, for the travelers on the county road; not for me.

Q. For the railroad crossing, to show the place?

A. Yes, sir. Public crossing. All crossings are public. That sign is public crossing; got a sign board there.

Q. The signal for the station is just beyond this crossing, for the Alcolu Station?

A. Yes, sir; on the right hand side of the road going down that way (indicating)?
A. Yes, sir.
Q. Just beyond the whistle post?
A. This side of the whistle post.
Q. Between Manning and the whistle post?
A. Yes, sir.

Redirect examination.

By Mr. DuRant:

Q. Mr. Smith, the attorney was asking you about that railroad crossing, big sign up there, between this car and the train; how big is that post?
A. About five inches square.
Q. How high is that crossing sign?
A. Way up high.
Q. That wouldn't keep any one from seeing the train, would it?
[fol. 69] A. No, sir.
Q. It is shown there on this side (indicating).
A. It is there at the crossing, on one side or the other; no obstruction to seeing.
Q. As I understand, he was trying to prove that Mr. Ford got behind that and couldn't see the train.

Mr. Davis: I wasn't trying to show that; I was merely pointing out that sign.

(Court recesses at this point, 6:00 o'clock p. m. October 30th, and re-convenes at 9:30 o'clock a. m., October 31st.)

J. A. Sargent (white) was called as a witness on behalf of the defendants and, having been duly sworn, testified as follows:

Direct examination.

By Mr. DuRant:

Q. Mr. Sargent, what is your business?
A. Photographer.

Q. Where?
A. Columbia, S. C.
Q. How long have you been engaged there in that business?
A. About twenty years.
Q. On March 7th, 1928, did you make some pictures down here in Clarendon County?
Q. Are those the pictures that you made (handing pictures to witness)?
A. Yes, sir.
Q. Is that a picture of Highway No. 26 (indicating)?
A. Yes, sir.

Mr. DuRant: We offer this picture in evidence.

[fol. 70] (Picture above referred to introduced in evidence and marked "Exhibit 9.")

Q. Now, this other picture that you hold in your hand is called what?
A. That is a panorama view.

Mr. DuRant: We offer this in evidence.

(Picture above referred to introduced in evidence and marked "Exhibit 10.")

The Court: This is the scene at the crossing?
The Witness: Yes, sir.

Q. Now, where was this picture No. 9 taken from; the 8 by 10 picture?
A. The 8 by 10 picture was taken—the camera was located in the road that said automobile was traveling, 150 feet back from the intersection of the roads where the road crosses the railroad tracks.
Q. That was 150 feet from the junction of the two highways?
A. Yes, sir.
Q. And back towards Manning?
A. Yes, sir.
Q. Now, the panorama was taken from what point?
A. From the intersection of the two roads, on the road he turned in, leading towards Turbeville, 92 feet to the nearest rail.

Q. Then that was taken from right in the junction of the two roads?

A. Yes, sir.

Q. And the panorama sweeps around?

A. Yes, sir.

Q. If a man were there and turned his head around, what is what he would see?

A. Yes, sir.

[fol. 71] Q. That was taken on March 7th?

A. Yes, sir.

Cross-examination.

By Mr. Davis:

Q. Mr. Sargent, the accident happened on March 4th, 1928, and three days after that you were down there?

A. Yes, sir.

Q. You live in Columbia?

A. Yes, sir.

Q. Getting ready early, weren't they?

A. I answered the call when they 'phoned for me to come, sir.

Q. I see. Now, this picture looks pretty large. The nearer you stand to an object, the larger the picture is, isn't it, in the camera?

A. That depends entirely upon the focal length lens that is in line with what the natural eye sees. It is the same vision that eye sees.

Q. In making the picture there, were you above the intersection of the road? Towards Sumter or Manning?

A. Towards Manning, 150 feet back.

Redirect examination.

By Mr. DuRant:

Q. Mr. Sargent, are you in any way connected with the Coast Line?

A. No, sir.

J. E. COTHRAN (white) was called as a witness on behalf of the defendants and, having been duly sworn, testified as follows:

Direct examination.

By Mr. DuRant:

Q. Mr. Cothran, what is your business?

[fol. 72] A. Field man of the claim department of the Atlantic Coast Line Railroad Company.

Q. How long have you held that position?

A. Twenty-one years.

Q. Mr. Cothran, do you know train 52—I believe it is fifty-two—that runs up from Charleston to Greenville, by Manning?

A. That is the train involved in this action.

Q. Does that train or not carry interstate mail?

A. It does.

Mr. Davis: I object, if your Honor please, I don't see what that has got to do with this case at all. It is true that my friends have alleged in their answer that this train*s* that runs, and which they allege in their answer, runs only from Charleston to Greenville, did carry the mail, but his answer itself, it seems to me, excludes any idea of its being engaged in interstate commerce. Now, this train, if your Honor please—I don't know, there may have been letters on that train passing through South Carolina into some other State, but what has that got to do with an action when the answer says that the train that did the injury only ran from Charleston to Greenville. The mail had nothing to do with the accident, but the train itself that ran from Charleston to Greenville was not engaged in interstate commerce, but was engaged in intrastate commerce. I don't see how on earth mail could be a burden on interstate commerce. At any rate, in the answer itself, it says that the train was not engaged in interstate commerce.

(The jury retires at this point, and after argument for and against the objection, the Court rules as follows:)

The Court: I am going to let this evidence in, because, under your pleadings, you are entitled to have it, but I will not be supposed to hold, or even intimate my opinion [fol. 73] as to any constitutional question.

Mr. Henry E. Davis: Oh, no.

The Court: I think it is admissible under the pleading in the answer, but I am not intimating any opinion of my understanding as to the constitutional questions raised by that answer.

Mr. Henry E. Davis: Well, we will present those at the proper time.

The Court: Let the jury come in.

(The jury returns.)

Q. Mr. Cothran, as an employee of the Atlantic Coast Line Railroad Company, has it been your business to familiarize yourself with the operation of this train from Charleston to Greenville, and what it carries?

A. Yes, sir.

Q. And you have been familiar with that for quite a number of years?

A. Yes, sir; I have.

Q. Now, does or not this train continually carry interstate mail?

A. Every day.

Q. Now, apart from the letters, how about the locked pouches?

A. There is a pouch delivered to the regular postal people in Greenville, destined for the Southern Railroad, north and south; one of the pouches being destined to Atlanta from this train.

Q. Now——

A. I might state that the pouches are delivered to the trains themselves.

Q. What states does the Atlantic Coast Line Railroad Company operate in?

A. The states of Virginia, North Carolina, South Carolina, Georgia, Florida and Alabama.

[fol. 74] Mr. Davis: I don't know what that has got to do with this.

The Court: Just to show its interstate connections, I presume.

Q. Have you personally been over all those roads in those States?

A. A good many times, yes, sir.

Cross-examination.

By Mr. Davis:

Q. How many states did you say you look after, Mr. Cothran?

A. My territory at this time is limited to South Carolina.

Q. Solely?

A. Matters arising within the State of South Carolina.

Q. What was then your jurisdiction on March 4, 1928?

A. Among a good many others, from Sumter to Lanes.

Q. Just over that road?

A. No, sir; I said among a good many others. I had the entire Charleston district at that time.

Q. Were you on the train on March 4th, 1928?

A. I was not.

Q. Were you at the depot in Charleston on March 4th, 1928, when train Number 52 left?

A. I couldn't say that; the chances are I was not.

Q. Yes, sir. Did you see, on March 4th, yourself, a pouch passing beyond Greenville?

A. I did not.

Q. Yes, sir; come down.

James Legare (black) was called as a witness on behalf [fol. 75] of the defendants, and having been duly sworn, testified as follows:

Direct examination.

By Mr. DuRant:

Q. James, what is your business?

A. Fireman.

Q. Were you on this train when this accident occurred?

A. Yes, sir.

Q. What was the first you saw of this Buick car?

A. Didn't see them at all, sir.

Q. Didn't see it at all?

A. No, sir.

Q. Until after the accident?

A. After the accident.

Q. What were you doing as you approached that crossing?

A. Putting in fire.

Q. Putting coal on the fire?

A. Yes, sir.

Q. Now, when the train—one minute. When the train was approaching that crossing, was the crossing signal given?

A. Yes, sir.

Mr. Davis: Better ask him what was done; you kicked over my leading questions.

The Court: You know, I have about come to the conclusion that you two gentlemen are the leading citizens of your community.

Mr. DuRant: That is from the society I have to keep here, if your Honor please.

Q. All right, now, what was done, if anything, in regard to giving signals for that crossing?

A. I don't understand.

[fol. 76] Q. I say, what was done, if anything, in regard to giving signals for that crossing?

A. After——

Q. No, before you got to the crossing.

A. It blowed the signal, and he turned the bell on before he blowed the signal. Put the bell on first then blowed the signal.

Cross-examination.

By Mr. Davis:

Q. Well, James——

A. Yes, sir.

Q. I believe the engineer says he can't see anybody on that side?

A. No, sir.

Q. You are putting in coal a good part of the time?

A. At that time I did.

Q. You were on the left side of the engine?

A. Yes, sir.

Q. Well, what do the citizens, the travelers do when the engineer can see, and you are putting in coal?

A. Those signs up there, sir.

Q. That is all. If he can't see a sign, then he has got to do the best he can, is that correct?

A. It seems to me, sir.

Q. Now, James, here is a plat that they have introduced in evidence (indicating). Where did you start putting in that coal at?

A. Just as soon as I got around that curve. Was setting upon my seat box, then I got down putting in coal, and before I got through we passed the crossing.

Q. For nearly a mile there the track is perfectly straight?

A. Yes, sir.

[fol. 77] Q. The highawy runs right by the side of it?

A. Yes, sir.

Q. Do you mean to say that in that mile you didn't see the man running along by the track?

A. I was busy putting in coal.

Q. As you approached that crossing there, there was nobody keeping a lookout for travelers to the left of that track, was there?

A. No, sir.

Q. Now, you knew about that crossing, didn't you?

A. I knew it was there.

Q. Huh?

A. Yes, sir; I knew the crossing was there.

Q. And just as you were approaching the crossing, where people frequently pass—that is a muchly traveled road, a lot of people cross there——

A. Yes, sir.

Q. And just as you were approaching that crossing you went to shoveling coal?

A. No, sir; I shoveled before I got to the crossing, and when I passed the crossing I was still shoveling.

Q. Why did you wait? Why didn't you put coal in down in the swamp?

A. I put in coal when it needs coal.

Q. You couldn't see and the engineer couldn't see?

A. The rule is the fireman is supposed to be on his seat box if the curve is on his side.

Q. When you are up there you look in front too?

A. Yes, sir.

Q. How are you going to take care of people on the crossing, and stop if necessary, if you look only straight down the track? How are you going to——

Mr. DuRant: We object, your Honor.

Mr. Davis: Cross Examination.

[fol. 78] The Court: That is more argument than anything else, Mr. Davis. Your question in its present shape is somewhat rambling.

Q. You say the engineer and you look down the track?

A. Yes, sir.

Q. You don't look to the side?

A. If I am on my seatbox, I look to the side, but when I am putting in coal, I can't see to the side.

Q. You were putting in coal that day, as you were approaching that crossing?

A. Yes, sir.

Q. Rainy day, wasn't it?

A. A little Jew rain I call it.

Q. Jew rain?

A. Yes, sir. (Laughter.)

Q. There was another crossing down below there?

A. Yes, sir; one a little lower down, and one just a little above, as you come out of the swamp?

Q. Where were you then?

A. I was up on my seat box sitting down all that was a curve around there.

Redirect examination.

By Mr. DuRant:

Q. What is the fuel that runs that locomotive? What do you fire it with?

A. Coal.

Q. Will it run without coal?

A. No, sir.

Q. Is it or not your business to put that coal in?

A. Yes, sir.

Mr. Davis: That is argument, if your Honor please.

The Court: Yes, you are arguing it too.

Mr. DuRant: I don't think so, if your Honor please; some [fol. 79] will run with oil.

The Court: Don't you think that jury knows whether it will run without coal or not?

Mr. DuRant: I thought I was acting very carefully. Come down.

J. B. Pack (white) was called as a witness on behalf of the defendants and, having been duly sworn, testified as follows:

Direct examination.

By Mr. DuRant:

Q. Mr. Pack, in March, 1928, when this accident happened, where — you on that day?

A. Where was I on that day?

Q. Yes.

A. I was on the train that day, on the rear of the train.

Q. Where were you going from and to?

A. I was leaving Manning going to Alcolu?

Q. At what place were you on the train?

A. On the platform in the rear.

Q. Who else was on that platform?

A. My uncle, Mr. Joel Harrington.

Q. Mr. Joel Harrington?

A. Yes, sir.

Q. Mr. Pack, what was the first you knew of the accident?

A. Well, the first, you know, my uncle—me and my uncle was standing on the rear of the train; it is a crossing there; I looked towards Manning, and you can see the last tres*sel.* So I saw this car turning the curve, and it was running along with the train, just like my hand (indicating). It [fol. 80] **passed the train, and I watched it as far as I could see it——**

Q. What kind of car was it?

A. A cream colored master six Buick touring car. I heard the train blow, and the train gave a jerk like that (indicating). I opened the door on the left hand side next the highway, and I peeped around to see if I could see that car go on. I didn't see no car, but I seen one coming. It was a Ford, then I looked back and saw the wreck. I

grabbed up a cushion out of the train, and we lay the man on it; man and woman too. We picked them up and put them on the train and carried them to Alcolu.

Q. Did you hear the man say anything?

A. The old man said he wasn't—he didn't want his name to go in the paper, and said he wasn't going to any hospital, and he took his grip and set it in the depot at Alcolu——

Q. You got down at the wreck?

A. Yes, sir.

Q. What did you see with reference to fruit jars?

A. I saw some fruit jars all piled up. I picked up a quart jar with a little piece broke, and it had whiskey in it. I give it to one of the railroad men.

Q. Did you smell it?

A. Yes, sir.

Q. Was it whiskey?

A. Yes, sir.

Cross-examination.

By Mr. Davis:

Q. Mr. Pack, you say you were a passenger on the train?

A. Yes, sir.

Q. Where were you going?

[fol. 81] A. Going to Alcolu.

Q. From Manning?

A. From Manning.

Q. Where do you live?

A. At that time I lived on Mr. Harmon Timmons' place across the swamp.

Q. What were you going to Alcolu for?

A. To see my mother.

Q. You were living over here?

A. Yes, sir; I was living on Mr. Harmon Timmons' place.

Q. You say that day you saw some broken up fruit jars?

A. Yes, sir.

Q. You say you found some liquor in a broken fruit jar?

A. A quart jar, broke, just about that much (indicating).

Q. Mr. Pack, isn't it a fact that the only liquor found anywhere that day was in a little bottle?

A. What I saw was in a quart jar.
Q. Who drank it?
A. Nobody.
Q. Who smelled it?
A. Me.
Q. Who else?
A. My uncle smelled it.
Q. Just you and your uncle?
A. I don't know whether anybody else smelled it or not.
Q. Did the railroad officials smell it?
A. I don't know, sir.
Q. Didn't you call their attention to it?
A. Gave it to them.
Q. You picked it up?
[fol. 82] A. My uncle picked it up.
Q. And gave it to one of the railroad officials?
A. One of the railroad men?
Q. Where did you see the people?
A. Laying on cushions on the side of the little path——
Q. Before that, where did you get them from to put them on the cushions?
A. Off the ground; the man was in the ditch with his head buried up side the ditch, and the lady was in the middle of the track.
Q. After the wreck?
A. Yes, sir. She kept falling and falling, like an addled chicken.
Q. And that is where she ended up?
A. Yes, sir.
Q. A good many of the witnesses said she was leaning against the bank.
A. She was in the track.
Q. Did you see Mr. Walters' car come along there?
A. I didn't even know him.
Q. Mr. Walters here, did you see him?
A. I saw a car come up there——
Q. Right along with you?
A. The train passed him, and this car passed him and the train.
Q. They passed Mr. Walters?
A. Yes, sir.
Q. Did you see him?

A. I saw them; I don't know whether that was the man or not, because I didn't know him.

Q. What kind of car was he driving?

A. I didn't take any notice.

Q. Then how did you come to notice this car?

A. It was driving so fast.

[fol. 83] Q. How fast was the train running?

A. I couldn't tell you.

Q. The engineer said he wasn't running over thirty to thirty-five miles an hour. If it was running thirty miles he was running how fast?

A. I should think he was running faster than the train when he passed.

Q. What you are trying to make the jury believe is that he was racing with the train?

A. He was in the train——

Q. He passed you?

A. Passed the train.

Q. Suppose, as a matter of fact, the train had not left Manning when he was over there coming out of the swamp, what would you say then?

Mr. DuRant: If your Honor please, I don't think he should be arguing with the witness that way.

The Court: That is argumentative. A great deal of latitude is allowed in cross examination, but that is argumentative.

Q. Rainy day?

A. Misting rain.

Q. Hadn't it been raining hard?

A. Misting rain.

Q. Curtains up on that car?

A. Yes, sir.

Q. Curtains up on Mr. Walter's car?

A. I didn't notice. The only car I was taking notice of was this car that went in the ditch.

Q. You didn't even notice the curtains on Walter's car?

A. No, sir.

Q. Yet you noticed this one?

A. I noticed this one.

[fol. 84] Q. How long have you lived in this county, Mr. Pack?
A. This county here?
Q. Yes.
A. Practically all my life.
Q. Where were you born?
A. Alcolu.
Q. Alcolu?
A. Yes, sir.

Redirect examination.

By Mr. DuRant:

Q. You are living in Berkeley County?
A. Yes, sir.

Recross-examination.

By Mr. Davis:

Q. Near Hell Hole?
A. No, sir; I ain't at Hell Hole; on this side of Hell Hole.
Q. Near by it?
A. About twelve miles from there.
Q. What is your business down there?
A. I am saw-milling.

J. L. Herrington (white) was called as a witness on behalf of the defendants and, having been duly sworn, testified as follows:

Direct examination.

By Mr. DuRant:

Q. Mr. Herrington, on the occasion of this accident in March, 1928, were you or not on that train?
A. I was on it.
[fol. 85] Q. Where did you get on it?
A. At Manning.
Q. Where were you going?
A. To Alcolu.

Q. For what purpose?

A. Just going with that man over there to see his mother (indicating).

Q. Uh-huh; she is what kin to you?

A. She is my wife's sister's daughter.

Q. Where were you riding on the train?

A. On the rear end of the train; me and him was standing out there together.

Q. Did you or not see this Buick, or some car of that kind, pass the train?

A. Yes, sir.

Q. What was the first you knew of the accident?

A. It was raining pretty fast, looked like; me and him made the remark——

The Court: Don't state the remark you made.

Q. It went on past you?

A. Yes, sir.

Q. What was the first thing you knew that the train hit the car?

A. I felt the train jerk that way (indicating), and it passed on, and I saw a lady, looked like, rolling side of the track, and I said to him——

The Court: Don't state what you said to him.

A. And the train backed back——

Q. Did you get off of the train?

A. Yes, sir.

Q. Did you go down where the wreck was?

A. Yes, sir; we all got down there and got to picking up the things that was scattered out of the car, you know.

Q. What about the fruit jars?

[fol. 86] A. Several of them broke up there. There was one broke, looked like it had half pint of liquor in it.

Q. How do you know it was liquor?

A. I smelled it.

Q. You know the smell of liquor?

A. Yes, sir; you can tell it better by tasting it.

Q. Then they put them on the train and carried them on to Alcolu?

A. Yes, sir.

Q. You got off at Alcolu and went on?

A. Yes, sir.

Q. Mr. Herringon, did you or not hear Mr. Ford say anything about why the accident happened, or as to his condition or anything of that sort?

A. No, sir.

Mr. Davis: I didn't catch your question.

Mr. DuRant: I asked him if he heard Mr. Ford say anything about why the accident happened——

The Witness: I heard him tell the conductor he took on a little bit too much.

Q. That he had taken on a little bit too much. Yes, sir. Now, did you hear anything said about the newspapers or anything of that kind by Mr. Ford?

A. No, sir.

Cross-examination.

By Mr. Davis:

Q. You were in the Court house when Mr. Ford testified on yesterday?

A. Yes, sir.

Q. Speak out.

A. Yes, sir.

Q. You heard Mr. Ford and his wife, both say that they left the scene in an automobile? You heard them say that? [fol. 87] A. I think I heard them say so.

Q. And then you say they were knocked unconscious, I believe. Your nephew said Mrs. Ford was turning around like a chicken on the track; you heard them say that?

A. Yes, sir.

Q. Then you say, they were in that kind of condition, blood running down Mr. Ford's head, all over him?

A. I don't know where it was running; there was a little place on his head.

Q. Blood all over it?

A. Yes, sir; as soon as they got his wife up she asked where he was.

Q. He was over there moaning in the ditch?

A. Yes, sir.

Q. You say he told the conductor he had a little too much liquor?

A. Yes, sir.

Q. You heard him tell him that?

A. Yes, sir.

Q. You smelled the liquor and drank some of it?

A. No, sir; I smelled it.

Q. Why, don't you like it?

A. I like it. It is a good thing in its place, but out of its place it is a bad thing.

Q. You were raised how?

A. I say, it is a good thing in its place, but out of its place it is a bad thing.

Q. What was done with that jar, you say you picked it up?

A. I picked it up and set it down; I don't know who got it.

Q. Your nephew said you gave it to one of the men?

[fol. 88] A. One of them picked it up; I don't know which one it was.

Q. You did give it to the railroad official?

A. One of them, I don't know who it was.

Q. That wasn't the little bottle you heard Mr. Ford describe?

A. I saw that little bottle too; a pickle bottle; had some in it.

Q. Did you smell any liquor on Mr. Ford?

A. No, sir; I didn't get that close to him.

Q. You were looking for liquor; did you smell any on him?

A. No, sir.

Q. Did you smell any on Mrs. Ford?

A. No, sir; I wasn't very close to her at all.

Q. You were just going with this boy over to Alcolu that morning?

A. Yes, sir.

Q. Paying railroad fare and all, just for a trip?

A. We didn't have nothing else to do; it was Sunday.

Q. That is the day people go to Church?

A. Yes, sir; or go visiting.

Q. But you had to be there when the accident occurred didn't you, Mr. Herrington?

A. I didn't know the accident was going to occur.

J. E. Wood (white) was called as a witness on behalf of the defendants and, having been duly sworn, testified as follows:

Direct examination.

By Mr. DuRant:

Q. Mr. Wood, what is that, please sir (handing paper to [fol. 89] witness?)

A. This is an identification of an honoring or pass as transportation on train——

Mr. Davis: One minute, if your Honor please——

The Witness: This slip I have in my hand is for train number eighty, on March 4th, pass honor for B-11559.

Q. I think you have the cart before the horse.

Mr. DuRant: Our friend has admitted these were handled on train eighty from Savannah to Lanes. By this man I was going to prove he handled them from there on.

Mr. Davis: Now, if your Honor please, just to preserve our rights—I presume this is in line also with the mail question. Just to preserve our rights, I would like to object to this testimony on the ground there is no interstate commerce here.

Mr. Henry E. Davis: Your Honor, I have a request from the general solicitor to have them read into the record and return them.

Mr. DuRant: The objection of the plaintiff's attorney goes to the competency, the effect and the relevancy, but not to the fact that this witness did not make these slips.

Mr. Davis: No, no.

The Court: The same question raised a while ago. You can just read those things into the record if you want to return them.

Mr. DuRant: I am going to ask a leading question by consent:

Q. Mr. Wood, that identification slip of pass B-11559 shows that the conductor on number eighty handled that—allowed that man to travel on that train from Savannah to what point?

A. To Lanes.

Q. Is this the regular slip that the conductor has?

A. That is furnished to us by the company for identi-
[fol. 90] fication.

Q. That is signed by the man that is passed?

A. Usually.

Mr. DuRant: I will read this identification slip into the record: "No. F-84282, Atlantic Coast Line Railroad Company, Identification Slip for holder of pass No. B-11559, W. M. Fauber and wife. Number of passengers carried, 2. From Savannah to Lanes, Train No. 80, date, 3-4-1928."

(Paper above referred to introduced in evidence and marked "Exhibit 11.")

The other one is "No. F-84275, Atlantic Coast Line Railroad Company, I*ned*tification Slip for holder of pass No. C-40729, Leary Lewis, number of passengers carried, 1, from Savannah to Charleston, train No. 80, date, 3-4-1928."

(Paper above referred to introduced in evidence and marked "Exhibit 12.")

Q. Now, Mr. Wood, do those identification slips show that those passengers traveled from Savannah to Lanes and Charleston, respectively, on Train No. 80?

A. The identification slip, yes, sir.

Q. On this date, on -arch 4th?

A. Yes, sir.

Q. Now, look at that identification slip (handing paper to witness.) Now, that shows that you carried that passenger, or those passengers, from what point to what point?

A. The identification slip shows from Lanes to Columbia, Trains 52 and 54, on the 13th.

Q. That is for W. M. Fauber and wife?

A. Yes, sir.

Mr. DuRant: This slip is read into the record: "F-17148, Atlantic Coast Line Railroad Company, identification slip [fol. 91] for holder of pass B-11559, W. M. Fauber and wife, number of passengers carried, 1, from Lanes to Columbia, Train No. 52 and 53, 3-4-1928."

(Paper above referred to introduced in evidence and marked "Exhibit 13.")

Q. Now, do you identify that pass (handing paper to witness)?

A. My punch mark is in the top, three punches in the bottom of the pass.

Q. That shows that you handled that pass?

A. Yes, sir.

Q. And that you cancelled it?

A. No, sir; that shows I honored it. The pass was for beyond the point I was going on that train.

Q. But you honored it?

A. Yes, sir.

Q. Is this the slip you had to send in with your report on that occasion?

A. Yes, sir.

Mr. DuRant: I read it into the record: "Atlantic Coast Line Railroad Company. Trip pass, going coupon, Leary Lewis, and one colored laborer, account laborers to Augusta, Georgia, from Manor, Gr. Residence, Augusta. Requested by F. H. A. Date issued March 1st, 1928; good for one trip only, until March 13th, 1928. Void if detached, subject to conditions on accompanying pass. Issued by Executive Vice-President."

(Slip above referred to introduced in evidence and marked "Exhibit 14.")

I read into the record "Identification slip No. F-17146, Atlantic Coast Line Railroad Company identification slip, for holder of pass No. C-40729, Leary Lewis. Number of passengers carried, 1. From Charleston to Sumter, Train No. 52, date, 3-4-1928."

[fol. 92] (Paper above referred to introduced in evidence and marked "Exhibit 15.")

Read into the record and withdrawn by order of the Court.

Q. Now, Mr. Wood, on this occasion, were you the conductor on train No. 52?

A. Yes, sir.

Q. Now, with train No. 80, where do you make the connection?

A. Frequently we get them from Lanes or Charleston.

Q. Sumter is your connection point for what points?

A. Augusta, Orangeburg——

Q. So far as this pass is concerned, you carried them to Sumter, and that was the junction point?

A. Yes, sir.

Q. For him to carry them to Augusta, Ga. Mr. Wood, what was the first that you saw of this car, or automobile that was struck.

A. After the thing had stopped.

Q. You didn't see it before that?

A. No, sir.

Q. What was the first you knew of the accident?

A. The porter told me we had hit a car——

Mr. Davis: Don't tell what the porter said.

Q. What was unusual about the train?

A. The brakes went down on the train.

Q. You got out there, what did you find?

A. We backed the train up to the crossing and found a car had been hit, knocked over on the right hand side of the track; broke it up pretty bad, the back seat. A man and lady were on the ground. The baggage master and the flagman were back there when I got there. To the best of my memory the baggage master and the lady passengers were giving all the aid they could to the lady. The lady [fol. 93] was on the track. The man didn't know anything when I got there. We got some cushions out of the train with the intention of laying him in the aisle. He raised up and said he was all right. The first thing he appeared to know when he raised up.

Q. Did he or not get up then and walk about?

A. He got up.

Q. What did he do? Where did he go?

A. I asked him his name and address.

Q. What was the name he gave you?

A. E. Z. Ford was the name I got.

Q. What was his address?

A. Charleston, South Carolina.

Q. Did you tell him why you wanted his name?

A. I told him there was a North Carolina tag on his car——

Mr. Davis: Was the plaintiff present?

The Court: It is a part of the res gestæ.

The Witness: I told him there was a North Carolina tag on his car. He said he was from Winston-Salem; he didn't want it in the papers. I said I wanted it for the accident report, and he said he didn't want no report.

Q. What was then done with Mr. and Mrs. Ford?

A. Dr. Brockington showed up on the scene. It was advised that he was a doctor. He examined them the best he could as conditions were around there. It was understood between me and Dr. Brockington that he would put them on the train and carry them to Sumter, and he would get back on the train at Alcolu. They were put on the train and carried to Alcolu.

Q. How did they get on the train?

A. We put them on the train.

Q. Did they walk?

A. They walked with the assistance, the courtesy that [fol. 94] would be shown anybody in that condition.

Q. Did you tell them you were going to carry them to the hospital at Sumter?

A. Yes, sir; that was the understanding at the point of the wreck.

Q. Was that your understanding with them?

A. I hadn't heard any objections to them going to the hospital when we left.

Q. What was then said about their going to the hospital at Sumter?

A. Before we got to Alcolu—I don't know whether the lady said anything or not—the man said he didn't want to go to Sumter. Wanted to know how bad his car was wrecked, and he insisted on getting off at Alcolu.

Q. Did you insist on taking him on to Sumter?

A. No, sir; I offered to take him.

Q. And he refused?

A. He didn't do it.

Q. You heard Mr. and Mrs. Ford testify that you took the train off and left them at the wreck with no assistance?

A. Yes, sir.

Q. On that occasion was there any neglect or discourtesy or anything of that kind as to them?

A. No, sir; none whatever, that I know of.

Q. So far as you were concerned?

A. So far as I was concerned.

Q. You say he insisted on getting off?

A. Yes, sir; he insisted. A lady from Charleston got a towel from her grip and wiped her face. She was one of the first passengers off the train.

Q. How did they get off at Alcolu? Were they carried off or anything of that sort?

A. No, sir.

[fol. 95] Q. How did they get off?

A. The gentleman walked off the train. The lady was on the platform. I helped her down and assisted her into the automobile.

Q. Did the lady walk off the steps?

A. Yes, sir; I caught her arm at the top of the steps.

Q. When you got her down to the ground, how did she get to the automobile?

A. She walked.

Q. What aid was rendered her?

A. I don't recall of anybody was holding her, except myself.

Q. In what way did you have hold of her?

A. By her arm.

Q. Did you support any of her weight?

A. I suppose I did, to a certain extent. I assisted her to the door and helped her in the car.

Q. Then the train went on?

A. Went on. Stayed there some few minutes. I gave an accident report of what had happened. I had been delayed down there, and of course I had to make the necessary report at Alcolu as to the cause of the delay.

Q. Now, Mr. Wood, when you left there, was there -thing further in your knowledge that you could have done that you failed to do?

A. No, sir.

Q. Now, down at the wreck, they say the car was turned around and the contents scattered around?

A. Yes, sir.

Q. What were some of the contents in regard to glass?

A. I saw some glass scattered around there.

Q. Fruit jars?

A. Yes, sir.

Q. Did you get any of the fruit jars?

[fol. 96] A. The flagman got a couple of them; three of them, I believe, and put them in the baggage car.

Q. What did they contain?

A. Whiskey was their last contents.

Q. How did you judge that?

A. By their odor.

Q. Did you smell it?

A. Yes, sir.

Q. You put them into the baggage car?

A. Yes, sir.

Q. What did you do with them?

A. I turned them over to the Coast Line police department in Sumter.

Q. Who was that?

A. Mr. Mims.

Q. You turned them over to him in the same condition in which you got them?

A. As far as I know. I told him to get them and see him when he went in the baggage car and got them.

Cross-examination.

By Mr. Davis:

Q. Mr. Wood, are you a married man?

A. Yes, sir.

Q. Does your wife ever put up peaches, fruits, vegetables and the like?

A. Frequently.

Q. I believe, in preserving peaches, you use sugar, do you not?

A. I don't know, I never preserve any.

Q. That is usual; anything sweet, I believe, can go into alcohol, can it not?

A. I suppose it can; I don't know.

[fol. 97] Q. Let me ask you this: Have you ever smelled a jar that preserved peaches and things like that had been -aken out of, and did it, or did it not have the odor of whiskey?

A. I think I could detect the odor between the peaches and whiskey.

Q. Isn't there a similarity?

A. It has a similar odor.

Q. These jars, I believe, went over in the ditch, did they not, where there was water.

A. These jars I picked up were on the bank of the ditch, on the right hand side of the track.

Q. I believe you say when you first got back there, Mr. Ford was unconscious?

A. He appeared to be.

Q. Moaning?

A. No, sir; very quiet.

Q. Before he came to, he had been taken into the car on some cushions?

A. No, sir; he was on some cushions. Hadn't taken him in the car. He was on some cushions and we taken him across the track.

Q. When he came to and you asked him about his name and address, and he told you he didn't want it in the paper?

A. Yes, sir.

Q. Into whose car at Alcolu did you put them?

A. I couldn't say.

Q. Wasn't it the doctor's car?

A. I couldn't say.

Q. They were under the impression that they had left the scene in the doctor's car. They said, I believe, that they left the scene of the accident in the doctor's car instead of the train; they must have still been under pretty bad——

[fol. 98] Mr. DuRant: If your Honor please, I don't see how he can be arguing with this witness——

Mr. Davis: Cross examination.

The Court: Cross examination is for the purpose — adducing information in reference to the matter under investigation. No, sir, Mr. Davis, you have asked this witness to give an opinion. Now, you can argue that to the jury as much as you please.

Q. Mr. Ford was pretty badly bunged up, wasn't he?

A. Apparently.

Q. And so was Mrs. Ford. Did you notice her nose?

A. Yes, sir.

Q. That was broken?

A. I don't know.

Q. It had had a lick?

A. Yes, sir.

Q. Of course you didn't see any of the bruises about over her body?

A. No, sir.

Q. Immediately after an accident, Mr. Wood—have you ever had any others?

A. Yes, sir; I have been in several.

Q. Immediately after an accident, and under the excitement of the occasion, can't a person walk when in a day or *say*, after that they can't?

Mr. DuRant: I don't know, if your Honor please, that this witness has qualified as an expert.

Mr. Davis: Anybody can tell that.

The Court: Unless he has seen the person. In order for him to answer the question he must know the nature of the injury.

Q. You have had injuries yourself, have you not, Mr. Wood?

[fol. 99] A. Yes, sir.

Q. Been hurt?

A. Yes, sir.

Q. It doesn't hurt as much afterwards as it does later on, when it gets sore, does it?

Mr. DuRant: If your Honor please, this man is not an expert on those matters——

The Court: From his experience.

Mr. DuRant: But the nature of the wound would have to be the same.

The Court: He is asking him, from his experience, whether an injury has such and such an effect. He can answer from his experience.

Q. What about it, Mr. Wood?

The Court: I think he can answer that question.

A. From my experience, I have had hurts or bruises that hurt worse the following morning than they did when I got them, but I have had bones broke, and they hurt worse then than they did any time afterwards.

Q. About Mr. Ford on that day, Mr. Wood, was there anything to indicate that he was a drunken man?

A. I didn't see anything, or smell any liquor on him.

Q. Was there anything to indicate that Mrs. Ford was under the influence of liquor?

A. No, sir; not to me.

Q. And that glass scattered there was what started this about liquor, wasn't it?

A. My attention was attracted by the odor of liquor.

J. H. Sessions (white) was called as a witness on behalf of the defendants and, having been duly sworn, testified [fol. 100] as follows:

Direct examination.

By Mr. DuRant:

Q. Mr. Sessions, in March, 1928, what was your business?

A. I was flagman on the train 52.

Q. Were you on the train on the day of this accident?

A. Yes, sir.

Q. Where were you?

A. Sitting on the rear seat in the rear car.

Q. Were Mr. Pack and Mr. Herrington right there that morning? You saw those?

A. I remember the two standing on the platform, and when I got off on the ground, they were still on the platform; I guess they were there when the accident occurred.

Q. Approaching this crossing, what signals were given if any?

A. The regular road crossing signals; I noticed that.

Q. What are those signals?

A. Two long blows, a short and a long.

Q. Was that the signal at that time, March, 1928?

A. As well as I remember, yes, sir.

Q. It was. Now, Mr. Sessions, the blowing of those signals, does that cover the time from the whistle post to the crossing?

A. That is mighty leading, if your Honor please.

The Court: That is entirely leading.

Q. The rule is what——

Mr. Davis: Not the rule, but what was done on that occasion.

The Court: Well, ask him that, if you like.

Q. What was done on that occasion?

A. Well, the signal was blown, but I couldn't tell, sitting [fol. 101] back there, what place it ended.

Q. What was the first you knew of the accident?

A. The brakes went into emergency, and the train stopped. I immediately went to the rear and looked and saw a suitcase on the track, Mrs. Ford was down by the ties on the roadbed, and Mr. Ford in the ditch, and the car was over in the ditch. The first thing we did was to get Mr. Ford out of the ditch and carried him over and laid him over on the other side of the track. About that time some other folks had got to Mrs. Ford, and she was sitting up. Got some cushions out of the train and put Mr. Ford on the cushions, and he raised up and looked for his automobile, and somebody helped him to see his car. They were helped on the train and taken to Alcolu.

Q. What do you mean by helped; were they carried on the cushions?

A. No, sir; helped by the assistance of—I don't know whether it was the conductor or a passenger.

Q. They got on the train. What happened then? Were you down there close to them?

A. No, sir; I wasn't there; my duties called me to the rear. I don't know what went on in the front part of the coach.

Q. When you got to Alcolu, what happened?

A. They were put off at Alcolu.

Q. You say they were put off?

A. They got off there, I learned after we left——

Mr. Davis: No, no.

Q. How did they get off? Did they walk?

A. They were assisted by the conductor in the usual manner.

Q. Both of them?

A. I don't remember—didn't help Mr. Ford any at all. Mrs. Ford, they helped her off.

[fol. 102] Q. Took her by the arm?

A. Yes, sir.

Q. What happened then? They got off the train?
A. Got off the train. That is as far as I could see, as box cars obstructed the view from them.
Q. You didn't see them get in the automobile?
A. No, sir.
Q. Now, then, down at the wreck, what did you see in regard to the fruit jars?
A. Well, I saw the broken glass, and the jars around.
Q. Did you smell any of those jars?
A. I did. It was called to my attention and I smelled some. Smelled like they might have contained alcoholic beverage; I couldn't say whether it was whiskey or not.
Q. Did it smell like corn whiskey or peach brandy?

Mr. Davis: Is he an expert, qualified on the smell?
The Court: Don't you think you better warn him——

Q. Was or not, Mr. Sessions, all of the aid and assistance given that could be done, as far as you know?
A. I think so; I know it was.
Q. Yes, sir. Was there anything that you could have done that you failed to do?
A. No, sir.

Cross-examination.

By Mr. Davis:

Q. You have smelled jars, out of which preserved peaches have come?
A. Yes, sir.
Q. That has an odor of alcohol——

Mr. DuRant: Not brandied peaches, if your Honor please——
Mr. Davis: Any kind.
Mr. DuRant: No, not any kind——
The Court: He can ask this question now, and you can [fol. 103] come back and show what he knows about brandied peaches. But it is competent.
Mr. DuRant: What they testified to was what they put up in sugar, so they couldn't be asking about any kind.
The Court: I think he must give the knowledge he has.
Mr. Davis: All right.

Q. Mr. Sessions, after preserves have been taken out of a jar for several days, is or is not the odor similar to that of alcohol?

A. Yes, sir; somewhat.

Q. You would not say whiskey was in that jar, would you, Mr. Sessions?

A. No, I wouldn't say it was, the ones that I smelled.

Q. You would not say that Mr. Ford was drinking that day, would you?

A. I didn't smell any whiskey about him.

Q. Nor Mrs. Ford there either, and you were close to them?

A. I helped carry Mr. Ford over on the opposite side of the track.

Q. And you smelled no liquor on them?

A. No, sir.

J. H. SNIPES (white) was called as a witness on behalf of the defendants and, having been duly sworn, testified as follows:

Direct examination.

By Mr. DuRant:

Q. Mr. Snipes, in March, 1928, what employment were you in?

A. Atlantic Coast Line.

[fol. 104] Q. What capacity?

A. Baggagemaster.

Q. Were you on Train 52 on March 4th when this accident happened?

A. I was.

Q. What was the first you knew of anything unusual that morning?

A. Putting the brakes in emergency and stopping the train.

Q. Before that, were the signals given, road crossing signals?

A. I couldn't swear I heard the whistle blow, but I presume——

Mr. Davis: I object to what he presumed.

The Court: You can't tell that.

Q. What did you do when it stopped?

A. I looked in both directions and saw a car in the ditch. We gave signals to the engineer to back up, so we could get up near the people and give assistance. We went back and some one brought the gentleman across the ditch and put him by the track. Someone had some cushions out of the train, and we laid him down on the cushions. We asked him his name. It took him some time to tell his name. Finally he told his name and where he was from.

Q. You remember what name?

A. I think it was E. Z. Ford, from Charleston. Then the conductor said he had a North Carolina license, then he said he was from Winston-Salem, North Carolina. Then he told him he didn't want that put in the papers. Then the conductor said he didn't want it for the paper, but for an accident report.

Q. What did Mr. Ford say about that?

A. He just told him his name and said he was from [fol. 105] Winston-Salem, North Carolina.

Q. Did you see the fruit jars around there?

A. I saw them after they were picked up and showed to me.

Q. Who put them in your car?

A. I think it was the flagman give them to me, Mr. Sessions.

Q. Did you smell those jars?

A. Yes, sir.

Q. What odor did they have?

A. Whiskey.

Q. What kind of whiskey?

A. Regular corn whiskey, smelled like to me.

Q. What did you do with those jars?

A. Put them in the baggage car, and they rode in the baggage car from the place of the accident to Sumter.

Q. In your charge?

A. Yes, sir; in my car.

Q. When they got to Sumter what became of them?

A. They were turned over to Mr. Mims, of the police department.

Q. Now, Mr. Snipes, how did these parties get on the train?

A. Well, they walked from where they first was to the door, and they were assisted on the train as usual. There

is a high platform at that point, and of course they were assisted up on the train.

Q. Was there anything apparent- wrong with the locomotion of either one's walking power?

A. I didn't notice anything.

Q. When they got down to Alcolu, what did they do then?

A. Got off the train.

Q. In what way were you looking?

[fol. 106] A. I was standing in the baggage car door; I didn't see them until they were getting off the steps of the coach.

Q. What did Mrs. Ford do?

A. Stepped down to the ground and walked to the car and got in, and was assisted, I believe, by the conductor.

Q. Was she limping in either leg?

A. I didn't notice any limping; I didn't notice any.

Q. She carried her own weight to the automobile and got in it?

A. Yes, sir.

Cross-examination.

By Mr. Davis:

Q. You saw her nose pretty badly bunged up?

A. She apparently had a lick on the nose; yes, sir.

Q. Didn't see any other bruises?

A. No, sir.

Q. Now, Mr. Snipes, of all the witnesses that have testified here today, you are the closest man to the engine, are you not?

A. To the engine.

Q. Yes.

A. Yes, sir.

Q. Now, let's go back to that fruit jar a moment. You would not—whatever it smelled like, are you prepared to swear that corn whiskey was in that jar or it smelled like it?

A. I can say, sir, that whiskey had been in that jar; yes, sir.

Q. How about fruit? How about fruit?

A. Fruit?

Q. Yes, sir. Preserved fruit. Several days after it is taken out, won't there be a similar odor?

[fol. 107] A. No, sir; not as that was, I don't think.

Q. You would not say that whiskey was in that jar at the time of the accident, would you?

A. I couldn't say so, no, sir.

Roy Mims (white) was called as a witness on behalf of the defendants and, having been duly sworn, testified as follows:

Direct examination.

By Mr. DuRant:

Q. Mr. Mims, in March, 1928, what was your business?

A. I was a member of the police department of the Atlantic Coast Line Railroad Company.

Q. Still hold that position?

A. Yes, sir.

Q. You are a native of what County?

A. Sumter County.

Q. Who was your father?

A. T. B. Mims.

Q. Mr. Brooks Mims?

A. Yes, sir.

Q. And his place was taken in from Clarendon County into that County?

A. Yes, sir.

Q. Were you born and raised, yourself, in Clarendon County?

A. Yes, sir.

Q. Now, on March 4th, on this Sunday, were you in Sumter?

A. Yes, sir.

Q. Were some fruit jars turned over to you?

A. Yes, sir; by the conductor of Train 52, on the morn-

[fol. 108] ing of March 4th.

Q. What did you do with them?

A. I took them and smelled them and labeled them and put them away in my office.

Q. What was the smell?

A. The two-quart jar had a strong odor of whiskey, or some alcoholic beverage, and this particular jar didn't

contain enough liquid to speak of. I guess the jar from the wreck caused the porcelain to break, and there was enough whiskey left to keep those pieces from shifting about. One of the quart jars had a slight odor, and the other, I couldn't detect any odor at all.

Q. Have you brought those jars here?

A. Yes, sir.

Q. Are those the jars?

A. Yes, sir.

Mr. DuRant: We offer these in evidence, if your Honor please.

(Jars above referred to, being three in number, introduced in evidence, and marked "Exhibits 16, 17 and 18.")

Cross-examination.

By Mr. Davis:

Q. They are just like they were when they were given to you, Mr. Mims?

A. Well, they seem to be a little dryer, I guess from evaporation.

Q. Uh-huh. They were not broken?

A. Inside, the jar top of the larger one was broken. The others were not.

Q. We are very much obliged to you for preserving some whole jars.

[fol. 109] D. O. SINGLETARY (white) was called as a witness on behalf of the defendants and, having been duly sworn, testified as follows:

Direct examination.

By Mr. DuRant:

Q. Mr. Singletary, what business were you in in March, 1928?

A. Section foreman for the Atlantic Coast Line.

Q. Section foreman for the Atlantic Coast Line. Well, I believe you didn't see the wreck. Were you down there?

A. Yes, sir.

Q. Well, how long after?

A. About thirty minutes.
Q. What was given to you as coming from the wreck?.
A. A small bottle with a gill of whiskey in it.
Q. What kind of bottle?
A. Catsup bottle.
Q. What did you do with it?
A. Gave it to Mr. Ford.
Q. Did he claim it as his bottle?
A. Yes, sir.
Q. How big a bottle was it? How tall?
A. About like that (indicating). About six inches tall.
Q. Mr. Singletary, was that crossing in good condition that morning?
A. Yes, sir.
Q. How far down this way is the curve in the railroad from that crossing?
A. At least three-quarters of a mile.
Q. The highway runs parallel with the track does it not?
A. Yes, sir.
[fol. 110] Q. Are there any obstructions, trees, bushes or anything else on that side from the curve to the crossing?
A. Nothing whatever.

Cross-examination.

By Mr. Davis:

Q. Anything in the way there to keep one on the engine from keeping a proper lookout and seeing anyone ahead of him on that road and as they turn to make that crossing?
A. It is impossible for an engineer to see people on the highway and watch his track.
Q. Is that it?
A. Utterly impossible.
Q. I am looking at you, and I see those gentlemen over there (indicating).
A. That highway is farther than those gentlemen.
Q. All right, I am looking at that door (indicating) and I can see those buildings across the street (indicating).
A. Get behind a boiler and see if you can see it.
Q. How about the fireman?
A. He can see it if he is looking out of the window.

Q. If he is looking out of the window he can see some one turning that curve?

A. Yes, sir.

Q. This bottle you are talking about that contained that gill of whiskey, that is the bottle they described on the stand yesterday?

A. I think it was.

Q. That was after the accident he asked you for it?

A. Yes, sir.

Q. You picked it up?

A. Some gentleman gave it to me at the wreck.

Q. What did he say he wanted it for?

A. Said he wanted it for his wife.

[fol. 111] Q. They had just been through a serious wreck, had they not, at the time he asked you that?

A. Yes, sir.

Q. Now, I believe you said that the engineer couldn't see anybody as they made that bend to go across, because of the boiler?

A. And watch his track I said. He couldn't see anybody on the highway and watch his track ahead of the engine.

Q. Doesn't it depend on how far a car is ahead whether he could see it or not?

A. Yes, sir.

Q. Of course, he couldn't see it if he was directly opposite, but he could see it 200 feet further ahead of him?

A. Yes, sir.

Q. And if a man was 200 feet ahead of the engineer on the road, if he didn't see him, it would be because he wasn't looking at him?

A. Sure, it would be because he wasn't looking at him.

Q. And looking down the track?

A. F. Gaus (white) was called as a witness on behalf of the defendants and, having been duly sworn, testified as follows:

Direct examination.

By Mr. DuRant:

Q. Mr. Gauss, in March, 1928, where were you employed?

A. At Alcolu.

Q. By whom?

A. D. W. Alderman & Sons Company.

[fol. 112] Q. How long have you been with them?

A. Been with them since 1910.

Q. Nineteen years. And still with them?

A. Yes, sir.

Q. You didn't see this wreck by which Mr. Ford's car was struck?

A. No, sir.

Q. What was the first you saw in regard to it, and where? When you heard of it, where were you?

A. I was at church.

Q. Where did you go then?

A. I went to the medical room where they had been taken.

Q. Did you see them get off the train?

A. No, sir.

Q. What medical room was that?

A. The medical room we have in the supply house, adjoining my office. D. W. Alderman's Sons Company's supply house, put there to take care of any minor accidents that happen on the place; a first-aid room.

Q. D. W. Alderman & Sons Company run a very large saw mill and planing mill plant, do they not?

A. Yes, sir.

Q. How many men do they usually have employed there?

A. About seven hundred, I would say. About four hundred at the mill.

Q. In doing that work there, tripping the logs, sawing them, planing them, is there the use of a great deal of machinery?

A. Yes, sir.

Mr. Davis: Your Honor, I don't see what that has to do with this case.

The Court: I don't either. He said he has an emergency [fol. 113] first-aid room there. You have got that much out. I don't see how how many men they employ is relevant.

Mr. DuRant: I will get to that immediately.

Q. Who is the physician who does the work at that plant?

A. Dr. Brockinton.

Q. How long has he been doing that work there?

A. Five years before I went down there, then he was sick and somebody else did that, then he started back.

Q. Has he or not, to your own knowledge, had a great deal of experience in handling emergency cases——

Mr. Davis: We object, if your Honor please.

The Court: Your witness has testified he was improperly treated.

Mr. Davis: But here is a layman by whom he is trying to prove a doctor's ability as a practitioner.

The Court: He asked him if he has had a lot of experience. If he knows that he can say so.

Mr. Davis: If your Honor please, let's get this straight. Your Honor has suggested that I brought out that matter. It was brought out by my friend on cross examination.

The Court: By your witness. Go ahead.

Q. Mr. Gauss, to your own knowledge, has or not Dr. Brockinton had a great deal of experience, over a long number of years, in the treatment of wounds and injuries sustained around machinery, and things of that sort?

A. Yes, sir; a very great deal.

Q. What is your duty, when an accident occurs, in regard to that room?

A. My duty is to render first aid; anything I can see to be done before the doctor gets there. The next thing is to get the doctor there, and the next thing is to assist the doctor until he gets through.

[fol. 114] Q. You have done that a number of years?

A. Yes, sir; over at my place of business where the injuries are taken care of.

Mr. DuRant: It seems to me now, your Honor, that I can ask him the question as to the doctor's competency.

The Court: No, sir; I think not. It is not a question of—beyond his general reputation, which he has given.

Mr. DuRant: All right.

Q. On this occasion you went to the supply house to care for these people. All right; how did they get up there?

A. I wasn't there, they were there when I got there.

Q. You didn't see them go in there?

A. No, sir; they were in there when I got to the supply house.

Q. When you got there what did you find?
A. The doctor was dressing Mr. Ford's arm.
Q. What was Mrs. Ford doing?
A. Pacing the room.
Q. How long did it take the doctor to treat Mr. Ford?
A. I would say about thirty minutes.
Q. What was Mrs. Ford doing during that time?
A. Walking back and forth across the room, and stopping occasionally and talking.
Q. Do you remember what she was talking about?
A. No, sir.
Q. Did you see the doctor treat Mr. Ford?
A. Just to the extent of getting the things he needed.
Q. You kept those things in charge?
A. Yes, sir.
Q. Was Mrs. Ford limping?
A. Apparently not, no, sir.
Q. Was she talking a great deal?
A. Why, she would just speak occasionally, have a con-
[fol. 115] versation occasionally; just start out first with a conversation, then may not have anything to say for some time, then have something more to say.
Q. Now, Mr. Gauss, has the Coast Line got any boarding house there or anything?
A. No, sir.
Q. When they left there where did they go?
A. I didn't see where they went.
Q. How did they leave there?
A. In Dr. Brockinton's car.
Q. How did Mrs. Ford go to the car?
A. She was assisted.
Q. Was she carried?
A. No, sir; she walked with the assistance of Dr. Brockinton, and Mr. Ford.
Q. I believe you say she walked there?
A. Yes, sir.
Q. Was she limping on one side or the other?
A. I couldn't see that she was. She wasn't walking as spry as she had been in the room there at first.
Q. Now, then, are you a locomotive engineer?
A. No, sir.
Q. You have run an engine, haven't you?
A. Yes, sir.

Q. I don't know whether you were in here or not, but counsel asked a good deal about the ability of an engineer to see what was on the left hand side of the track, down ahead of the engine; have you run an engine?

A. Yes, sir; some. That would depend on the length of the engine and how far the man was ahead of the engine.

Q. Does the boiler cut off the view?

A. Yes, sir.

The Court: Don't lead him.

[fol. 116] Cross-examination.

By Mr. Davis:

Q. Mr. Gauss, Mrs. Ford's nose was pretty badly bruised up, at the time, was it not?

A. I didn't notice that there was any what I would call severe bruises on her at all. She had some what I would call slight wounds.

Q. Knowing the situation she had been in, you were not surprised, were you, at her walking about the room?

A. No, sir.

H. G. Smith (white) was called as a witness on behalf of the defendants and, having been duly sworn, testified as follows:

Direct examination.

By Mr. DuRant:

Q. Mr. Smith, what is your business?

A. Sawyer for D. W. Alderman & Sons Company.

Q. Over at Alcolu?

A. Yes, sir.

Q. How long have you been at Alcolu?

A. Three years and two months.

Q. What boarding house or hotel was it that Mr. Ford and his wife went to when they left this place?

A. Mr. Aldermon's boarding house; I was in charge of it at the time.

Q. Did the Coast Line have anything to do with it?

A. No, sir.

Q. Did you see the accident?

A. No, sir.

Q. What was the first thing you saw of Mr. and Mrs. Ford?

[fol. 117] A. When they came up to my house.

Q. Did you have information that they were coming?

A. Yes, sir.

Q. When they came up there what happened?

A. They got out the car and come in the porch, and I met them at the door. Dr. Brockinton told me they were coming and to have a room prepared for them.

Q. Did you have a room prepared?

A. Yes, sir; would like to do a little more, but didn't have time.

Q. How did Mrs. Ford get from the car to the door?

A. I don't know; I met them at the door. They were on the porch.

Q. What was she doing on the porch?

A. Standing up.

Q. How did she get in the room?

A. Walked.

Q. Yesterday she claimed she didn't have any fire, no treatment of courtesies of any kind, extended to them; what did you do?

A. I built a fire in the stove for them, and in a hurry put them in my own bed room.

Q. Did you have any instructions from Dr. Brockinton to take care of them?

A. Yes, sir; he said don't let them be disturbed.

Q. Did you do the best you could?

A. I believe a couple did get to them during the day, but I told them the doctor's orders, and they left.

Q. I mean, so far as the general care and attention and all that.

A. I done the best I could. Built a fire for them, had something to eat for them.

Q. When did they leave your place?

A. Late that afternoon.

[fol. 118] Q. How did they go?

A. Went off in a Ford touring car.

Q. How did Mrs. Ford leave there? How did she come out?

A. She walked out.

Q. From the room to the car?

A. Yes, sir; she had assistance of course, and there were one or two walked along with her, had her by the arm.

Q. Was there any limping?

A. She was walking, as far as I know, straight.

Q. Were they carrying her in any way, or anything of that sort?

A. No, sir.

Q. But simply steadying her as a man does——

A. Yes, sir.

Q. Mr. Smith, you have run a locomotive?

A. Yes, sir; very limited, though; one day.

Q. Oh, all right.

Cross-examination.

By Mr. Davis:

Q. Mr. Smith, this has been nearly two years now since this accident, hasn't it?

A. Yes, sir.

Q. Now, when Mrs. Ford left that house you said she walked out to the car?

A. I didn't follow her to—clear to the car, but the same as she come into the house.

Q. She walked out to the car?

A. As well as I remember, she did.

Q. Didn't Mr. Ford get your brother-in-law to pick her up in his arms and put her in the car?

A. I don't remember that.

[fol. 119] Q. You don't remember that?

A. No, sir, I don't remember that.

Pink Scott (white) was called as a witness on behalf of the defendants and, having been duly sworn, testified as follows:

Direct examination.

By Mr. DuRant:

Q. Mr. Scott, where are you working?

A. D. W. Alderman & Sons Company.

Q. How long have you been there?

A. About twenty years altogether.

Q. What is the first you knew of this accident?

A. Well, the first I knew about it, I was at the station when the train come up and saw the people getting off.

Q. Did you see Mr. and Mrs. Ford get off the train?

A. Yes, sir.

Q. Where did they go?

A. They got off the train and went over to the supply house, to a little medical room over there.

Q. How did they go?

A. Just how they went I couldn't tell, because there was such an upstir there when they got off, all trying to find out how many got hurt, they just got out and went and got away.

Q. Was she walking?

A. Yes, sir; she was walking.

Q. Did you see her again?

A. Yes, sir.

Q. When was that?

A. Just a few minutes after the train left I was over [fol. 120] at the dark room where they was at.

Q. What were they doing then?

A. Mr. and Mrs. Ford were in the dark room—there is a partition in there—and she was passing from one room to another.

Q. Pretty nervous?

A. Yes, sir.

Q. What was her condition?

A. You know, all unnerved.

Q. During the time Dr. Brockinton was treating her husband, was she walking about there most of the time?

A. Yes, sir—well, no, sir; just passing from one room to the other. She would come in this room a few minutes, directly she would pass back.

Q. How did she leave there?

A. In Dr. Brockinton's car.

Q. How did she get from the supply house to the automobile?

A. Walked.

Q. And from the automobile to the hotel?

A. I didn't go to the hotel.

Q. Did you see her later in the day?

A. Yes, sir; later up in the day, I guess a couple of hours later, right about dinner time.

Q. Where was she then?

A. At the hotel.

Q. What was she doing then?

A. They was in a room then.

Q. Was she standing up or sitting down?

A. When I saw her she was sitting down at a heater at the time.

Q. Then did she get up and walk about?

The Court: That is leading.

A. Well, the time I saw her she was sitting down at a [fol. 121] heater. I took Mr. Ford in my automobile to his car.

Q. What did he say he wanted there?

A. To get a little package for his wife, but it was gone.

Q. What did he say it was?

A. It was am-o*i*nia, he said, to quiet his wife's nerves.

Q. Where did you find the am-onia?

A. Mr. Singletary, the section boss, had it.

Q. Mr. Ford recognized that as his bottle of am-onia?

A. Yes, sir.

Q. Did you know what was in it?

A. No, sir. I saw the stuff in it, but I couldn't say what it was.

Q. Did you go back up there with him to the hotel?

A. Yes, sir.

Q. Did you go in there?

A. Yes, sir.

Q. Did you see her walking about then?

A. No, sir; when I went back, Mrs. Ford was laying down at the time.

Cross-examination.

By Mr. Davis:

Q. Did you see him give Mrs. Ford any of the medicine?

A. No, sir; not at the time, because at the time when we got back—I don't know, at the time, the doctor had given instruction not to let anybody come in there. As I got in the door with Mr. Ford, Mr. Gauss come and told me the doctor's orders were not to disturb them.

Q. You took Mr. Ford down to the accident?
A. Yes, sir.
Q. Which way was the automobile facing?
A. Facing back towards the track.
Q. Were you the man who took him to Sumter?
[fol. 122] A. No, sir.
Q. Did you see Mrs. Ford as she left the hotel late that afternoon?
A. No, sir.
Q. Do you know the name of the man that took them to Sumter?
A. No, sir; I don't. It has been so long. I was to take Mr. Ford up there myself, but somehow or other I got tangled and had to do some work, and I didn't take him. Mr. Ford asked me to take him, I believe, late that afternoon.
Q. Now, Mr. Scott, was there any evidence about Mr. Ford or his wife of drinking?
A. Well, if there was, I couldn't tell it.

Redirect examination.

By Mr. DuRant:

Q. If she hadn't been through a wreck or anything of that sort, and was acting as she did, how about it then?
A. I tell you how I figure this, I imagine, in a wreck, it would be kind of hard to tell whether anybody was drinking or not. As I said just now, I don't know whether they was drinking or whether they wasn't.

Re-recross-examination.

By Mr. Davis:

Q. Did you smell any liquor on Mr. Ford?
A. No, sir; Mr. Ford run down there to his car with me and back, and I didn't smell any——

Redirect examination:

By Mr. DuRant:

Q. Were you in the front seat?
A. Yes, sir.

[fol. 123] Q. Where was Mr. Ford?

A. Mr. Ford was in the back seat.

Q. Mr. Scott, did you have any opportunity for smelling his breath?

A. Really, I didn't have any opportunity, because I didn't, you know, care anything about it.

Q. You didn't get close to him?

A. No, sir.

Recross-examination.

By Mr. Davis:

Q. Got close enough to talk to him?

A. Yes, sir; got close enough like two fellows talking.

Q. Did he talk like a drunk man?

A. No, sir; he did not.

Dr. W. M. Brockinton (white) was called as a witness on behalf of the defendants and having been duly sworn, testified as follows:

Direct examination.

By Mr. DuRant:

Q. Dr. Brockinton, are you a practicing physician and surgeon?

A. Yes, sir.

Q. I can't hear you.

A. Yes, sir.

Q. How long have you been practicing medicine?

A. Since 1887.

Q. Are you the surgeon and physician of the D. W. Alderman & Sons Company?

A. Yes, sir.

Q. How long have you been handling that business?

[fol. 124] A. About thirty-five years or longer.

Q. Now, on this occasion what do you know about the wreck?

A. I was going to Alcolu, and I drove up on this wreck. I was driving along the road and it attracted my attention and I stopped. I saw two people hurt. I didn't notice the wreck much; I was interested in the hurt people, and I examined them the best I could at the time, and had an

understanding with the conductor what we would do with them, and he was to put them back on the train to go to the hospital in Sumter. I was to go to the hospital with them. I drove on to Alcolu to get somebody to take my car to Sumter. When I got to Alcolu they were standing on the platform of the train, and the conductor said: "They have refused to go to Sumter." I tried to get them to go, but they refused to go. Then I told the conductor I would take them to an emergency room over there and treated them the best I could, and then took them over to the Alcolu Hotel.

Q. Did you see Mrs. Ford get in the train?

A. No, sir.

Q. How did she get off the train?

A. She got off with the usual attention, as any other hurt person. She was able to walk down the steps; of course, she was supported more or less by the conductor. She walked from there to the automobile and was assisted into the car.

Q. Lifted?

A. Assisted in the usual way a man would assist a lady that was hurt. Wasn't necessary to carry her at all or lift her.

Q. Then what happened, did you go in the same car?

A. I am not positive as to the car, whether I went in the car or not. Anyhow, we took her to this supply house. [fol. 125] She was assisted; not necessary to carry her at all. She walked. They went in there and I examined them the best I could and dressed the wounds.

Q. The testimony of Mrs. Ford yesterday was that they both seemed to be so seriously wounded that you didn't know which one to take first.

A. I suppose Mr. Ford did look that way; he was bleeding from the head, and she suggested that I take Mr. Ford first.

Q. What was she doing during that time?

A. She was walking about talking a good deal; very little about the hurt, but other things.

Q. What was her general demeanor? Did you come to any conclusion or idea as to her——

Mr. Davis: I think he better state the facts.

A. After examining Mrs. Ford, after a thorough examination, she looked to me like a person that had drunk too much whiskey.

Q. How about her talk?

A. Her talk indicated the same. Of course she was more or less nervous too. She had been through enough to make her nervous, no doubt about that.

Q. You say she didn't talk much about the wreck itself, but was talking about other things?

A. Yes, sir; she was telling me she was a nurse, that she had been trained at a railroad hospital in Georgia, and that she knew me and had nursed patients for me; kept saying that over and over; I guess she said that twenty-five times. Then Mr. Gauss came in and she knew him she said and would keep saying that about him. After a while Mr. Ford told her several times to stop talking so much. She said a little about the wreck, but not much.

Q. What did she say about the dog?

[fol. 126] A. I don't remember her mentioning the dog. Mr. Ford mentioned the dog once or twice. She might have mentioned the dog, but I don't remember it.

Q. What did you find was the matter with Mrs. Ford?

A. She had several lacerations. The worst was near her nose, or on her nose, several about the face. Just abrasions, rubbing of the skin, not sufficient to sew up, and she had a small injury on her leg.

Q. When was that called to your attention?

A. After I got through with the other.

Q. That was the last thing?

A. Yes, sir.

Q. What did you find as to that?

A. I found only an abrasion of the skin, no swelling.

Q. Is that what you call a bruise?

A. Yes, sir.

Q. No swelling?

A. No, sir. There may have been a slight swelling.

Q. At the time you examined it was after the wreck had happened, and they had gone to the supply house and after you had treated their wounds and everything after the wreck?

A. Yes, sir.

Q. How long was that after the wreck?

A. I don't know, Mr. DuRant, I was so busy. I would suppose, when I got through with them it was at least an hour, but that is very hard to tell.

Q. Now, Doctor, you are the one who 'phoned to the boarding house about their going there, or was that done under your instructions?

A. Yes, sir. I don't remember whether I 'phoned or someone else, but any how we had an arrangement at the boarding house.

Q. Now, Doctor, they have claimed mistreatment on the [fol. 127] part of you and your employees, and everything of that kind, of the railroad. Was there anything more that could have been done for them?

A. Nothing that I know of, Mr. DuRant. We tried to do everything in our power for them.

Q. The boarding house they were put at, did it belong to the Coast Line, or have any connection with the Coast Line?

A. Not that I know of.

Q. Now, the treatment of their wounds, what was the treatment that you gave them as regards care or negligence?

A. I gave them what is supposed to be the best antiseptic treatment at this time. Of course some of them become infected, but the majority of them are infected when you see them. Of course these dirty wounds, we don't expect them to get better without infection.

Q. You gave them the best, most modern treatment?

A. Yes, sir.

Q. Dr. Harding says "I found she had an injury to the knee, with separation of upper extremities, the tibia and fibula." What is that?

A. The tibia is the large bone in the leg running from the ankle to the knee, the fibula is the small bone running from the ankle nearly to the knee, running parallel to the tibia. It doesn't reach the joint proper by about two and a half inches.

Q. It says "ligaments lacerated, and articulation of bones dislocated." Now, Doctor, you understand what he is driving at. The upper extremities separated and ligaments lacerated; that would mean torn, we would call it?

A. Yes, sir.

Q. The articulation of the bones dislocated. Now, Doctor, if there was a separation of those bones from this ac- [fol. 128] cident, could you have discovered it, examining as you did, before there was any swelling?

A. If there was a laceration of the muscles or the ligaments that hold that bone in position, she could not

have walked on that leg. She could not have put her weight on it. I might not have been able to detect the dislocation, with my conveniences, of that particular joint, depending on the amount of dislocation, but she would never have been able to have walked on it.

Q. Now, Doctor, if she got this injury that Dr. Harding treated her for at that wreck, would she have walked on that leg right away on that day?

A. No, sir.

Q. Now, from your examination and your observation of her and of her movements on that occasion, are you prepared to say that the injury that the doctor up there says she has got she didn't have at the time you saw her last?

A. She didn't have that injury at the time I treated her; that is, as stated in that particular——

Q. I say, as stated there?

A. Yes, sir.

Q. You have seen her walking here?

A. Yes, sir.

Q. Does her gait indicate to you that she now has that injury?

A. I wouldn't like to express about that one way or the other, because I haven't examined her.

Cross-examination.

By Mr. Davis:

Q. Doctor, how long did you say it took to treat these two people?

A. I couldn't say positive, Captain, a man busy that way. [fol. 129] I said at least an hour, may have been longer.

Q. Doctor, don't it take eminent surgeons very often sometimes three or four days or a week to discover an internal injury?

A. Yes, sir.

Q. Did she complain of her knee to you?

A. Very little until she got to the hotel.

Q. As a matter of fact, in an injury to the bones and the ligaments, as time goes on, stiffness, sources and pain will show up, won't it?

A. Yes, sir.

Q. What might not be felt immediately after the injury, in several days after that or several hours after that might be excruciating pain?

A. Oh, yes, sir. You might suffer more tomorrow from an injury than you would today.

Q. If there was such an injury as the doctor treated her for four or five weeks, she would suffer extreme pain?

A. Yes, sir.

Q. Would you say the doctor is wrong when he says there is partial paralysis of the left leg?

A. I wouldn't say one way or the other.

Q. You won't deny that, will you?

A. No, sir.

Q. You say she made no complaint of the knee?

A. Very little complaint of the knee at that time.

Q. Then there was no occasion for your examining it, was there?

A. Yes, sir; because she complained of it.

Q. I thought you said there was very little complaint.

A. Yes, sir.

Q. You say that a person with the ligaments in the knee torn or lacerated, that binds those bones together, [fol. 130] can't walk at all.

A. I didn't say that. I said, with that particular injury there, they couldn't walk.

Q. Well, you see she is walking, getting about some kind of fashion, putting her weight on it.

A. Yes, sir; I don't know what she is doing now. She is using a crutch. I am only speaking of the time I saw her.

Q. Do you know Dr. Harding?

A. No, sir.

Q. You don't know Dr. S. A. Harding?

A. Not that I remember.

Q. Now, what does it mean by the articulation of the bones being dislocated?

A. You understand, that is not the knee proper you are talking about.

A. All right, sir. He says injury to the knee.

—. ——.

A. It is about two inches from it.

Q. That is all right. At that point, what does he mean by this "Lacerated, and articulation of bones dislocated?"

A. I would suppose, from what he says there, that the union was broken loose between the tibia and the fibula at that particular point, and that the ligaments that assisted in holding that bone to them was lacerated.

Q. Can you say that wasn't the situation?

A. That wasn't the situation when I saw her.

Q. That day?

A. That day.

Q. Doctor, if the doctor did find that situation when they got to Mocksville, you are not suggesting to the jury that these people here are coming here and claiming for an injury that didn't happen over here at Alcolu, are you?

A. Put that question again.

Q. I say, are you claiming that if they went to the doctor [fol. 131] at Mocksville and he found that situation there, you don't suggest that these people are here claiming for an injury that didn't happen at this accident?

A. I am not claiming anything of the kind, sir. I am only stating that that couldn't have been there at the time that I examined this lady.

Q. He says it is a fact, and that is a thing that can happen to a person, isn't it?

A. Oh, yes, sir.

Q. Doctor, that injury would make a person and the nerves of the knee—would make a person very nervous?

A. Yes, sir.

Q. After going through a wreck like that, are you surprised that she walked the floor?

A. She wouldn't have an injury like that and walk the floor.

A. No, sir; she should be nervous.

Q. I say, are you surprised?

A. No, sir; she should be nervous.

Q. You attribute it to liquor?

A. I said she appeared to be under the influence of liquor?

Q. Now, Doctor, that is a very serious charge to make.

A. I know it is.

Q. Here is a lady just come out of the injury, walking the floor, very nervous, and you say she was acting like a drunk person, rather than a nervous person, whose nerves have been shattered by this wreck?

A. Yes, sir; I hate to make a statement like that.
Q. I should say so.
A. But that is a fact.
Q. Are you surgeon for the Coast Line also?
A. Yes, sir.
Q. Now, Doctor, for the last several years you have [fol. 132] been troubled with an unfortunate trouble yourself, have you not?
A. Yes, sir.
Q. Frequently, because of the pain, you have got to be doped, have you not?
A. No, sir.
Q. Sir?
A. No, sir.
Q. You have got to take something to ease the pain, haven't you?
A. No, sir. I had to take something to relieve pain when I was suffering from radium burns at different times.
Q. You didn't see them leave the hotel, did you?
A. No, sir.
Q. You took them from the depot to the supply station, I believe?
A. Yes, sir.
Q. Did the best you could for them there?
A. Yes, sir.

Redirect examination.

By Mr. DuRant:

Q. Doctor, if a patient came to you, in order to make a diagnosis of that kind, what would you do first thing?
A. What do you mean, Mr. DuRant?
Q. In other words, to make a diagnosis of that separation, in order to treat it and all, would you have a picture made?
A. Yes, sir; we would have a picture made, especially if we were in any way suspicious. The rule is now, if we are in any way suspicious, we have pictures made.
Q. You have an X-Ray made to see what was done?
A. Yes, sir.

[fol. 133] Recross-examination.

By Mr. Davis:

Q. Doctor, which leg did you examine?

A. I would suppose, from what he says there, that the union was broken loose between the tibia and the fibula at that particular point, and that the ligaments that assisted in holding that bone to them was lacerated.

Q. Can you say that wasn't the situation?

A. That wasn't the situation when I saw her.

Q. That day?

A. That day.

Q. Doctor, if the doctor did find that situation when they got to Mocksville, you are not suggesting to the jury that these people here are coming here and claiming for an injury that didn't happen over here at Alcolu, are you?

A. Put that question again.

Q. I say, are you claiming that if they went to the doctor [fol. 131] at Mocksville and he found that situation there, you don't suggest that these people are here claiming for an injury that didn't happen at this accident?

A. I am not claiming anything of the kind, sir. I am only stating that that couldn't have been there at the time that I examined this lady.

Q. He says it is a fact, and that is a thing that can happen to a person, isn't it?

A. Oh, yes, sir.

Q. Doctor, that injury would make a person and the nerves of the knee—would make a person very nervous?

A. Yes, sir.

Q. After going through a wreck like that, are you surprised that she walked the floor?

A. She wouldn't have an injury like that and walk the floor.

A. No, sir; she should be nervous.

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A. I know it is.

Q. Here is a lady just come out of the injury, walking the floor, very nervous, and you say she was acting like a drunk person, rather than a nervous person, whose nerves have been shattered by this wreck?

A. Yes, sir; I hate to make a statement like that.
Q. I should say so.
A. But that is a fact.
Q. Are you surgeon for the Coast Line also?
A. Yes, sir.
Q. Now, Doctor, for the last several years you have [fol. 132] been troubled with an unfortunate trouble yourself, have you not?
A. Yes, sir.
Q. Frequently, because of the pain, you have got to be doped, have you not?
A. No, sir.
Q. Sir?
A. No, sir.
Q. You have got to take something to ease the pain, haven't you?
A. No, sir. I had to take something to relieve pain when I was suffering from radium burns at different times.
Q. You didn't see them leave the hotel, did you?
A. No, sir.
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A. Yes, sir.
Q. Did the best you could for them there?
A. Yes, sir.

Redirect examination.

By Mr. DuRant:

Q. Doctor, if a patient came to you, in order to make a diagnosis of that kind, what would you do first thing?
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Q. In other words, to make a diagnosis of that separation, in order to treat it and all, would you have a picture made?
A. Yes, sir; we would have a picture made, especially if we were in any way suspicious. The rule is now, if we are in any way suspicious, we have pictures made.
Q. You have an X-Ray made to see what was done?
A. Yes, sir.

[fol. 133] Recross-examination.

By Mr. Davis:

Q. Doctor, which leg did you examine?

A. I don't remember now which it was, Captain.

Q. Did you examine the leg that the bruise was on, to which your attention was called?

A. Yes, sir.

Q. Did you examine the other leg at all?

A. No, sir.

Q. It happens to be the other leg that was injured, Doctor, and not the one that you examined.

A. I examined the one that she complained of.

Re-redirect examination.

By Mr. DuRant:

Q. Doctor, if all this had happened at that wreck, would she have complained of it?

A. Yes, sir.

Q. And she would not have walked?

A. No, sir.

(Court recessed at this point, 1:00 o'clock P. M., and reconvenes at 3:00 o'clock P. M.)

Mr. DuRant: We rest.

The Court: Anything in reply?

Mr. Davis: Yes, sir; one witness.

GEORGE G. FORD was recalled as a witness on behalf of the plaintiff in reply and testified as follows:

Direct examination.

By Mr. Davis:

Q. Mr. Ford, on yesterday, I believe, something was asked one of these witnesses—I forgot who now—but they [fol. 134] were asked about the train, just the natural rolling of a train behind an automobile. What about that? What about the difficulty of hearing——

Mr. DuRant: Why, if your Honor please——

The Court: You went into that on your chief examination.

Mr. Davis: I don't think exactly on that point, if your Honor please.

The Court: I think you did, and this witness said something about the ability to hear.

Mr. DuRant: Yes, sir; he said that, and we haven't put up any testimony on that.

Mr. Davis: Oh, yes.

The Court: I don't recollect whether you have or not, but it seems to me you have, and this case has taken up a great deal of time. Seems to be some diversity of opinion; better let the stenographer look it up.

Mr. DuRant: The witness R. E. Thompson, and also the witness Berry, who was some three or four hundred yards away——

The Court: I don't think that is the question he has asked. He is asking, as I understand, the ability to hear a train riding in a car.

Mr. DuRant: This wit*ens*s has testified about that.

The Court: Let the stenographer read that; this witness' testimony in chief.

Mr. Davis: I think I can fix that, if your Honor please; I will ask him this question.

Q. You heard the witness Walters, I believe it was. You heard him testify that just as he passed the swamp the train passed him and he heard the signal blow?

A. Yes, sir.

Q. You stated that you didn't hear it?

A. Yes, sir.

[fol. 135] Q. Explain to the jury how that could occur——

Mr. DuRant: One minute. I fail to see, if your Honor please—it seems to me that is argumentative.

The Court: If he can speak along that line, but just as a matter of argument it would not be competent. If he can speak from experience he can do so, but he would have to give the facts upon which to predicate it.

Q. All right, give your experience in driving by trains?

A. We can take one very plain example, not connected with automobile, that I had. I was riding one day between Adams Run and Pon Pon, riding a bicycle, from Pon Pon to Adams Run, on a clear, pretty day, no wind or anything. I don't know what made me do it, but as I stepped off, I looked, and there was a three-coach passenger train——

Mr. DuRant: We object——
The Witness: —coming full tilt——
Mr. DuRant: We are not being tried for that.
The Court: No.
The Witness: —and there was absolutely no sound.
Mr. Davis: He is giving his experience.
The Court: Your question is not that it may be so, but why.

Q. Explain why?
A. I was riding on this bicycle against the wind——

The Court: Never mind about that.
The Witness: Driving ahead of a locomotive or train in an automobile four or five hundred yards, you are going against the wind, the wind is against the curtains of the car, the locomotive is rolling, the greater part of the sound is taken back by the wind; you are going away from the sound; but after the train has passed you, the sound comes back to you, because it is brought back to you by the wind.

[fol. 136] Q. In a passenger and freight, it makes a great difference in that?
A. Yes, sir.
Q. A passenger train doesn't make as much noise——
A. With a heavy freight train working hard, it is very noticeable. With a light passenger train, with the head valve cut off the exhaust is so light you can hardly hear it until it is right on you. Therefore, a passenger train, with silent running cars, if the whistle blows, no reason why you shouldn't hear it.
Q. Now, Mr. Ford, let's get back. You are charged, as I understand it, by the witnesses, practically all of them, with transporting liquor. Did you state in your first testimony how and where those bottles were gotten from?

Mr. DuRant: Yes. He did't state where.

Q. Where they were gotten from?
A. Gotten out of a vacant garage in the yard I was at. My sister said, as I was starting off, "I have got a whole lot of empty bottles——

Mr. DuRant: We object, if your Honor please, to the conversation.

The Court: You wanted to know where he got them from.
Mr. DuRant: He hasn't said——
The Witness: I said as——
The Court: Never mind.
The Witness: Her little boy took a carton and went out in the garage and filled it up. I didn't notice them——
Mr. DuRant: He has testified to that.

Q. Mr. Ford, if there was any liquor about those jars placed in the back of the car by that little boy on that day, did you on your oath know anything about it?
A. Nothing whatever, Mr. Davis.
Q. Now, I believe Dr. Brockinton is the only man that [fol. 137] said so, but he stated that your wife on that day appeared to be under the influence of liquor after all of this accident was over; did she at any time that day drink any liquor?
A. No, sir; none but a very small—might have been a mouthful, that I gave her at the junction of the Smmerville road, where I turned around, and that was on account of her nervousness.
Q. Now, I believe the testimony is you were knocked unconscious at the accident there, and something said about your not wanting your name in the paper, and some misstatement as to where you were from.
A. Mr. Davis, I have no recollection of saying anything. They may have asked me where I was from and I might have said Charleston. The first conversation I recollect, the doctor came up and said, "Let me take you"——
Q. That was at Alcolu?
A. I was told it was Alcolu. My first recollection was being taken by the arm by the doctor, and he said, "I will take you to the office." I thought that was at the wreck: That is the first thing I can remember. Must have been at Alcolu. I had no reason for wanting to keep it out of the paper, unless my wife's——

Mr. DuRant: Your Honor, his reasons are not competent.
The Court: I think it is competent.

Q. You had other family besides your wife?
A. Yes, sir; I think that the jury can look at me and see that I am not——

The Court: One minute. Don't argue the case.

Q. Mr. Ford, I believe the witness Walters stated that he was on the road from Manning to Alcolu, on the same road that you were traveling on, and that he met the train [fol. 138] just as he got out of the swamp. Did you pass Walters or anybody between Manning and the accident?

A. No, sir.

Q. You passed nobody?

A. No, sir.

Q. Did you pass any train as this witness Pack said?

A. Now, sir, Mr. Davis, I was far ahead of the train. I went to state that the two witnesses that got up here——

Mr. DuRant: One minute, if your Honor please——

The Court: You better state what the counsel asks you.

Q. State whether or not, Mr. Ford, the statements of thoes two witnesses on the back of the train, whether their statements about your passing the train, running at a fast rate of speed, is true or not——

A. No, sir.

Mr. DuRant: One minute—those witnesses said a car passed, but said they didn't know who was in it——

Mr. Davis: Oh, yes; they did——

The Court: I think he can state whether that is correct.

Q. Is that true or untrue, Mr. Ford?

A. Absolutely untrue, all of it.

Cross-examination.

By Mr. DuRant:

Q. Then it appears that you differ from almost every other witness in the case?

A. What is that?

Q. You seem to differ from all the other witnesses in the case; you are not the only true witness in the case?

A. Possibly.

The Court: You are doing the same thing he did.

[fol. 139] Mr. DuRant: He put his face in evidence.

The Court: Yes; but you should not do the same thing he did.

Q. Where did you get those jars?

A. Out of the yard of the house I was staying in, out of the garage.

Q. I am trying to get at the name of the person, the house, if you know, who was it? Who lives there?

A. John Donehey. D-o-n-e-h-e-y.

Q. D-o-n-e-h-e-y. Where does he live in Charleston, what address?

A. 205 Cumming.

Q. Upstairs or down?

A. Down.

Q. Apartment house?

A. No, sir. There was a family living upstairs; I don't know who they were.

Q. Is he your brother-in-law?

A. Yes, sir.

Q. You and he married sisters, is that right?

A. Yes, sir.

Redirect examination.

By Mr. Davis:

Q. You say there is a man living upstairs?

A. There was a family living upstairs; I don't know who they were. I was only there for a day.

Q. This garage serves that building?

A. This garage was in the back yard. A lot of these bottles were in there; whose they were, I don't know.

———

[fol. 140] Mrs. KATHERINE H. FORD was recalled as a witness on behalf of the plaintiff in reply and testified as follows:

Direct examination.

By Mr. Davis:

Q. Mrs. Ford, do you know whether those jars are the jars that you sent preserves and fruit in from your place to Charleston or not?

A. No, sir; I have no way of identifying them.

Q. They are——

Mr. DuRant: We object; leading.
Mr. Davis: Very good.

Q. The doctor has testified, Mrs. Ford, that in the hotel —in his office, I believe, that you were walking up and down the floor, acting very much like somebody under the influence of whiskey. Were you under the influence of whiskey that day, Mrs. Ford?
A. Most positively not.
Q. Mrs. Ford, the doctor says he treated this—some wound on your leg that day.
A. He did.
Q. On which leg was it?
A. On the left leg.
Q. And the injury you suffer from is on what leg?
A. On the right leg.
Q. The doctor didn't——
A. Didn't examine that leg.
Q. Didn't examine that leg at all?
A. No, sir.

Mr. DuRant: No questions.
Mr. Davis: I think that is all, if your Honor please.

Mr. Henry E. Davis: Your Honor, suppose you allow the jury to retire, I want to raise a legal question.
[fol. 141] The Court: You may retire, gentlemen.

(The jury retires.)

The foregoing constitutes all of the testimony taken at the trial of the case.

IN COURT OF COMMON PLEAS OF CLARENDON COUNTY

DEFENDANTS' MOTION FOR A DIRECTED VERDICT

At the close of the entire case, the defendants moved the Court for a directed verdict in their favor, on the following grounds:

1. In that there is no proof of any negligence on the part of the defendants that caused the accident and alleged injuries to the plaintiff as a proximate cause thereof.

2. In that there is no proof of any wilfulness on the part of the defendants that caused the accident and alleged injuries to the plaintiff as a proximate cause thereof.

3. In that from the entire evidence it appears that the accident and alleged injuries to the plaintiff were due to her own negligence as a proximate cause thereof.

4. In that Sections 4903 and 4925 of Volume 3 of the Code of Laws, of South Carolina, commonly known as the [fol. 142] Crossing Statute, and which are made the basis of plaintiff's statutory cause of action, are unconstitutional, null and void:

(a) In that they deprive the defendants of their property without due process of law and deny to them the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States;

(c) In that the said statutes, as construed by the Supreme Court of the State of South Carolina, impose an unlawful burden and obligation upon the railroads, in that simple negligence is by statute made evidence of wilful negligence and also in that simple negligence is under the statute declared to raise a permanent presumption of fact that the same was the proximate cause of any injury which occurred, which presumption is to be given the effect of evidence to be weighed against opposing testimony and is to prevail unless such testimony is found by the jury to preponderate;

(d) In that the said statutes, as construed by the Supreme Court of the State of South Carolina, raise unreasonable and arbitrary presumptions of the fact that are to be given the effect of evidence to be weighed against opposing testimony and which are to prevail unless such testimony is found by the jury to preponderate, and that by reason thereof said Sections deprive the defendants of their property without due process of law and deny them the equal protection of the laws in violation of the provisions of the Fourteenth Amendment of the Constitution of the United States and constitute an interference with interstate commerce.

RULING OF THE COURT

The Court: At the close of all the testimony in this case, a motion is made for the direction of a verdict in favor of [fol. 143] the defendants, upon the several grounds set out in its proposed motion.

The first ground of the motion relates to the force and effect of the evidence, the sufficiency of the evidence, more particularly speaking. It is sufficient that I say in relation to that, that there is evidence which would warrant a submission of this case to the jury.

Section One of ground four, challenges the constitutionality of Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, commonly know- as the Crossing Statute. They challenge the constitutionality as predicated, briefly stated, upon the grounds that these statutes imposed a burden upon interstate commerce, that they deny to the defendants due process of law, and that they deny to the defendants the equal protection of law under the provisions, as they are guaranteed, of the Constitution of the United States, the Fourteenth Amendment.

The matter is one of grave concern, of vital importance, and one which has given me a great deal of concern, and I have endeavored to give it fair consideration. It is a serious matter to declare the deliberate action of the law-making power of the State to be unconstitutional, but it is the duty of the Court to do so if it is convinced that the act is unconstitutional, however, I am not so convinced in this case.

The defendant bases its motion squarely upon the case of Goodman v. B. & O. R. R. Co., 275 U. S., 66, and the recent case of Western & Atlantic Railroad Company v. Henderson, reported in the advanced opinions of the United States Supreme Court, 73 law edition, under date of June 15th, 1929. In that case, they held to be unconstitutional a statute of the State of Georgia, which is as follows:

[fol. 144] "A railroad company shall be liable for any damages done to persons, stock, or other property by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised

all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

So far as the challenge of the constitutionality of Sections 4903 and 4925 of the Code of Laws of South Carolina is concerned, in their relationship to interstate commerce and the due process of law, it is clear to my mind that Section 4903, which has relation to the giving of signals at crossings, does not deny the due process of law, and does impose a burden upon interstate commerce. It is, in my judgment, a valid and wise exercise of the police power of our State.

I am by no means satisfied that this train was engaged in that class of interstate commerce which would affect this question.

Now, as to the challenge to Section 4925, which is in these words—and I cite that because I intend to compare the language of Section 4925 of the language of the Georgia statute, upon which the opinion in the Henderson case is predicated. Our statute reads as follows:

"If a person is injured in his person or property by collision with the engines or any car or cars of a railroad corporation at a crossing, and it appears that the corporation [fol. 145] neglected to give the signals required by this Chapter, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment, as provided in the preceding Section, unless it is shown that in addition to a mere want of ordinary care the person injured, or the person having charge of his person or property, was at the time of the collision guilty of gross or wilful negligence, or was acting in violation of the law, and that such gross wilful negligence or unlawful act contributed to the injury."

I think the language out that statute sufficiently indicated that that, too, is an exercise of the police powers of our State. It relates to a crossing admittedly dangerous; a grade crossing than which can be no greater danger to the wayfarer on the public highway. It provides for a fine recoverable by indictment, which to my mind is conclusive evidence that it intends to be an exercise of the police powers of our State.

To go further, in the Henderson case, or rather, in the statute of Georgia, passed upon in the Henderson case, it will be observed that the railroad company by that statute is sought to be made liable for any damage at any time under all circumstances, where the damage is inflicted by its locomotives, cars or other machinery, or by persons engaged in its service, the presumption in all cases being against the company. Now, the Supreme Court of the United States, in construing that statute, uses this language: "Legislation declaring that proof of one fact or group of facts shall constitute prima facie evidence of an ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred. [fol. 146] A prima facie presumption casts upon the person against whom it is applied the duty of the going forward with his evidence on the particular point to which the presumption relates."

Now, it seems to me that that is an apt description of Section 4925 of our Code. Section 4925 does not impose any obligation upon the railroad company until the plaintiff has made it appear that the corporation neglected to give the signals required to be given at that crossing, and that Section gives to the defendant railroad company the opportunity, and does not require it to exercise its right until it has been made to appear—and necessarily by a preponderance of the evidence under the rule—that the signals were not given; that the corporation neglected to give the signals, that there was negligence in the failure to give the signals; it gives it then the right to rebut the presumption which our statute raises from the failure to give the signals, by showing that the person who was injured, or the person in charge of his person or property, was guilty of gross negligence or was acting in violation of law.

I don't consider that that deprives the railroad of the due process of law, nor do I consider that it deprives it of the equal protection of law. Great privileges are given these public corporations, whether they be interstate in their creation or intrastate in their creation and relation. Great privileges are given them. They may take private property for their own use for proper compensation therefor. They go over the land, and the machinery which they use is necessarily of great danger, even when most carefully used. I don't think this deprives them of the due

process of the law or the equal protection of the law. It seems to me that our statute, the Section under review, is analogous to the Mississippi statute, cited in the Henderson [fol. 147] case, and in part quoted, and which was held to — valid. The Court says in that case that that was an action in a Court of Mississippi to recover damages for the death of a section foreman accidentally killed in that State. While engaged about his work, he stood by the track to let a train pass; a derailment occurred and a car fell upon him. A statute of the State provided "Proof of injury inflicted by the running of the locomotive or cars of such (railroad) company shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury." That provision was assailed as arbitrary, and in violation of the due process clause of the Fourteenth Amendment. This Court held it valid and said: "The only legal effect of this inference is to cast upon the railroad company the duty of producing some evidence to the contrary. When that is done, the inference is at an end, and the question of negligence is one for the jury upon all of the evidence. The statute does not fail in due process of law, because it creates a presumption of liability, since its operation is only to supply an inference of liability in the absence of other evidence contradicting such inference." Then they say, referring to the Georgia statute: "That case is essentially different from this one. Each of the State enactments raises a presumption from the fact of injury caused by the running locomotive or cars. The Mississippi statute created merely a temporary inference of fact that vanished upon the introduction of opposing evidence. That of Georgia as construed in this case creates an inference that is given effect of evidence to be weighed against opposing testimony and is to prevail unless such testimony is found by the jury to preponderate."

For these reasons, gentlemen, I must deny the motion for a directed verdict. It is a very, very grave and intri- [fol. 148] cate question, and I hope it will be decided. It ought to be decided. I don't think it ought to be left open. If the Supreme Court reverses me, I shall have done what I think is right and proper.

Now, Mr. DuRant, Mr. Davis suggested that in case the motion was overruled, these requests would not apply.

Mr. DuRant: Well, you would not charge them, but, of course, we don't withdraw them.

The Court: When I say they would not apply, I mean that they are refused. Let the jury come in.

IN COURT OF COMMON PLEAS OF CLARENDON COUNTY

DEFENDANTS' REQUESTS TO CHARGE

1. There is no presumption that anyone has violated a criminal law such as the crossing statute in this case, but there is on the contrary a presumption of innocence and the burden is on the plaintiff of proving that the statute was violated.

2. A violation of the crossing statute being a criminal offense, not only is there no presumption that it was violated, but evidence of its violation must be sufficient to prove same beyond a reasonable doubt to entitle plaintiff to a verdict for damages for such violation.

3. It appears from the evidence that the train involved in the collision in this case was engaged in the transportation of interstate mail and interstate passengers, and was therefore as a matter of law engaged in interstate commerce. I charge you that the rights and obligations of a traveler on a highway approaching a grade crossing of a railroad and of a train engaged in interstate commerce approaching such crossing are such that the traveler can have [fol. 149] no higher rights than the railroad company in the operation of such interstate commerce train. The Supreme Court of the United States has laid down these duties in these words:

"When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows he must stop for the train, not the train stop for him. In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look. It seems to us that if he relies upon not hearing the train or

any signal and takes no further precaution he does so at his own risk. We are dealing with a standard of conduct, and when the standard is clear it should be laid down once for all by the courts."

I charge you that this statement of the law is applicable to the facts of this case, and if you find the plaintiff did not take the proper precautions as laid down by the Supreme Court of the United States, your verdict must be for the defendants.

4. I charge you that under a proper construction of Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, the failure to give at the highway crossing involved in this suit the signals required thereby (if there be such failure) affords no presumption whatever that such failure was the proximate cause of the collision between the automobile in which plaintiff was riding and [fol. 150] the train of the defendant railroad company, but plaintiff must prove what was the proximate cause of such collision and that the defendants were responsible therefor.

5. I charge you that under a proper construction of Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, as soon as the railroad company introduced evidence rebutting plaintiff's evidence that the signals required thereby were not properly given for the crossing involved in this suit, the temporary inference of fact arising from plaintiff's evidence completely vanished from the case and there is now no presumption whatever that the collision was caused by the negligence of the defendants as a proximate cause thereof, and it is incumbent on plaintiff to prove what was the proximate cause of such collision and that the defendants were responsible therefor.

6. I charge you that Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, commonly known as the crossing statute, in their operation upon railroad companies engaged in interstate commerce impose an unlawful burden upon such commerce and are therefore void under Section 8, Article I of the Constitution of the United States.

7. I charge you that Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, commonly known

as the crossing statute, are unconstitutional, null and void in that they deny to the defendant railroad company the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

8. I charge you that Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, commonly known as the crossing statute, are -cunstitutional, null and void in [fol. 151] that they deprive the defendant railroad company of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

All of these requests were refused by the Court except the first.

IN COURT OF COMMON PLEAS OF CLARENDON COUNTY

JUDGE'S CHARGE TO THE JURY

MR. FOREMAN AND GENTLEMEN OF THE JURY: I have been struck with the exemplary patience and close attention that you have given to this case and the facts as they have been developed by the evidence. It is always gratifying when jurors show an intelligent interest in the evidence, b-cause the law of South Carolina makes you the sole judges of that evidence; the sole judges of the facts, the truth or want of truth of the testimony. I am not allowed to intimate to you any opinion that I may have along that line; that is your province, your especial province under the Constitution of our State. That same law makes me the sole judge of the law of the case. I can't invade your territory, nor can you invade mine. You take the law just as I give it to you. The difference between your province and mine is that if I make an error in declaring the law to you, there is a higher court that will correct me, but your findings as to the facts are conclusive.

This is an action in damages. The plaintiff, by her complaint, seeks to recover damages in the sum of $25,000.00 from the defendants, Atlantic Coast Line Railroad Company and W. M. Smith, for injuries wh-ch she alleges she has suffered through the negligence, willfulness, reckless-

[fol. 152] ness and wantonness of the Atlantic Coast Line Railroad Company and W. M. Smith, its agent, employee and servant.

The special allegations of this complaint are that on the 4th day of March, 1928, the plaintiff and her husband, George G. Ford—the plaintiff being Katherine H. Ford—were driving along the highway in your county, and that at a point between Manning and Alcolu, where the highway crosses the track of the defendant railroad company, the automobile in which they were riding was struck by the engine and train of the railroad company, and that the plaintiff suffered bodily injuries which she alleges she sustained herein.

Now, she alleges that her injuries were due to the negligence, wilfulness, recklessness and wantonness of the defendants in that they didn't give the signals required by law, to-wit: the ringing of the bell or the blowing of the whistle continuously until the train had passed the crossing. That in consequence of this negligence, wilfulness, recklessness and wantonness of the defendants, the automobile was struck and [illegible]ocked into a ditch, and that the plaintiff was thrown t[illegible]ough the windshield of the automobile into a large ditch, was knocked unconscious and seriously and painfully injured, the bones in her left knee being separated or fractured, her face and scalp being cut, torn and lacerated and various parts of her body being cut and bruised, and as a result of the separation of the bones of her knee, the cutting, tearing and lacerating of her face and scalp and the cutting and bruising of her body, plaintiff was forced to remain in bed for five weeks and thereafterwards for several months forced to walk on crutches, and she alleges that she has been permanently injured and has permanently lost the full use of her left knee and has suffered, and continues to suffer, great pain and mental anguish, all of which is to [fol. 153] the damage of the plaintiff in the sum of Twenty-Five Thousand Dollars.

Now, gentlemen, she alleges that the specific acts of negligence, willfulness, recklessness and wantonness were in the failure of defendant Atlantic Coast Line Railroad Company and its agents and servants in charge of the operation of the train to keep a proper lookout; in the failure of defendant Atlantic Coast Line Railroad Company and its

agents and servants in charge of the operation of the train to stop the same and avoid the collision; in the failure of the defendant Atlantic Coast Line Railroad Company, its agents and servants in charge of the operation of said train to stop the same before the plaintiff was thrown from the said Buick automobile; in the failure of the said defendant Atlantic Coast Line Railroad Company to have said train equipped with proper brakes or other devices for stopping same; in having said train operated by an incompetent engineer; in the failure of Atlantic Coast Line Railroad Company to provide a safe crossing at the place of the collision; in the failure of defendant Atlantic Coast Line Railroad Company, its agents and servants in charge of the operation of said train, and particularly on said engine, to give the signals in the manner required by Section 4903 of Volume 3, Civil Code of South Carolina, for the year 1922.

Now, that is the plaintiff's complaint. I have divested the complaint of much of its legal verbiage and technical language.

Now, the answer admits that it is a corporation, and it also admits that at the time mentioned the plaintiff was riding with her husband in a Buick automobile, and that said automobile collided with a train of the defendant railroad company at the crossing generally known as "Trinity Crossing," in Clarendon County, but they deny all the remaining allegations of paragraph two, and all the allegations of paragraph three and paragraph four.

[fol. 154] Now, as a second defense they allege that the defendants operated the locomotive and train in a careful manner and in full compliance with all the laws governing its operation at the time and place mentioned in the complaint; but that the plaintiff and her companion traveled for a mile along the side of the railroad track and in full view thereof and turned out of the main highway on which they were traveling at a point on the edge of the right of way and immediately adjacent to said track, and with the train of the defendant in full view in the day time, did not stop, look or listen, but rushed on the track and attempted to cross it ahead of the train in a grossly careless and reckless manner, as a result of which the accident happened. That the plaintiff either saw the train or was guilty of gross negligence in failing to see the same, and could have

stopped the said automobile or warned the driver of the danger, and should have done so, which would have prevented the injury complained of. That the plaintiff wilfully and knowingly and with gross negligence contributed to her injury as a proximate cause thereof by her own acts and careless conduct in wilfully and negligently guiding, directing, controlling, and participating in the operation of said automobile in the endeavor to speed across the ra-lroad track in the face of an obvious danger, thereby causing her own injury for which these defendants are in no wise responsible. That the train approached on the side of the automobile upon which plaintiff was sitting and in her plain view, and it was her duty to stop the automobile or warn the driver of the danger, all of which she failed to do, and by her gross negligence in above particulars contributed to her own injury as the proximate cause thereof. For a third defense, that the train with which plaintiff came in collision was a regular through passenger train of [fol. 155] the defendant railroad company, running from Charleston, South Carolina, to Greenville, South Carolina, and as such was, on this occasion, and regularly, engaged in interstate commerce and in the transportation of interstate mail; and that as applied to a train so engaged, Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, as construed by the Supreme Court of South Carolina, imposes a burden upon and is an unlawful regulation of interstate commerce in violation of Article I, Section 8, Paragraph 3, of the Constitution of the United States. For a fourth defense, that Section- 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina of 1922, these being the sections under which this suit is brought, as construed by the Supreme Court of South Carolina, deny to these defendants the equal protection of the laws and deprive them of their property without due process of law, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States and of Article I, Section 5 of the Constitution of the State of South Carolina.

Now, those are the issues which are made by the pleadings, and which you are to determine, except in so far as they are contained in the third defense and the fourth defense; those are questions of law which I have passed upon,

and they don't raise any question which you need consider in this case.

Now, Mr. Foreman and Gentlemen, this is an action for damages. The plaintiff claims the right to recover these damages because she says she has suffered serious bodily harm, which caused her great pain and mental suffering, through the negligence, wilfulness, recklessness and wantonness of the railroad company and its agent, servant and employe, W. M. Smith.

[fol. 156] In order that you may understand this claim, it is essential that you understand what negligence is. Negligence is the failure to exercise due care; the unintentional doing of something that is hurtful or harmful to another. The better definition is, the failure to exercise due care or ordinary care. Ordinary care or due care is the care which a person of ordinary prudence would exercise in and about his own affairs. Now gross negligence is the failure to exercise slight care; the failure to exercise slight care. As distinguished from ordinary negligence, simple negligence, it is the intentional, conscious failure to do a thing that it is encumbent upon one to do, or the doing of a thing intentionally that one ought not to do.

Now, the defendant sets up the pleace of contributory negligence on the part of the plaintiff. Contributory negligence in this case means this: The defendant says, "Even if I were negligent, grossly negligent and wilful in the particulars which you allege, nevertheless, you were negligent, you were grossly negligent, you were wilful in your conduct about the premises, and your negligence, gross negligence, wilfulness and wantonness combined with my negligence, gross negligence, wilfulness and wantonness that I might have been guilty of, concurred and combined as the proximate cause of the injury and without which it would not have happened." In other words, it means this, gentlemen: "If I were guilty, you were as guilty as I was, and your guilty conduct combined and concurred with my guilty conduct and contributed to the injury, without which it would not have occurred."

Now, it is encumbent upon the plaintiff, before she can recover in this action actual damages, to prove by the preponderance of the evidence the material allegations of her complaint. It is not necessary for her to prove every allegation in the complaint; if she proves one or more by the

[fol. 157] preponderance of the evidence, that is all that is required.

Now, what is the preponderance of the evidence? Not necessarily the greater weight of the evidence—I mean to say, not necessarily the greater number of witnesses introduced in support of the allegations of the complaint. The jury may believe one witness as against fifty. In the old hornbook of the law which we lawyers studied, or were supposed to have studied, when we prepared ourselves to be lawyers, this illustration is given of what is meant by the greater weight or preponderance of the evidence: You place in your hand an imaginary set of scales. In the one side you place the evidence in support of the allegations of the complaint; in the other side you place the evidence contrary to the allegations of the complaint; if the evidence in support of the allegations of the complaint preponderates, or outweighs the other side, then the plaintiff has sustained the allegations of her complaint by the preponderance of the evidence. But if the evidence on both sides balances, or if the complaint weighs down, then the plaintiff has not sustained the allegations of her complaint by the preponderance or greater weight of the evidence. After all, gentlemen, my conception of what is meant by the preponderance or greater weight of the evidence is that evidence which carries to your hearts, minds and your understanding the conviction of its truth. In order for the plaintiff to recover punitive damages in this case, she must, by that same measure of proof—I will take that phase up when I come to charge upon the statute.

Now, the defendant sets up a general denial, which casts upon the plaintiff the burden of proving the material allegations of the complaint, as I have charged you, but it goes further and says, "You were negligent, grossly negligent [fol. 158] and wilful, you could see the track and went upon it and brought about your own injury." That is one of the defenses. If the plaintiff brought about her injury by her own negligent, grossly negligent and wilful conduct she could not recover. She would be the author of her own injury, and could not recover of these defendants or either of them. Then they allege that she contributed to her own injury by her own negligent, grossly negligent, reckless and wilful conduct. We have in this state what is known as a crossing statute. The provisions of that are embodied

in Section 4903 of the Civil Code, Volume 3, of South Carolina:

"A bell of at least thirty pounds weight and a steam or air whistle shall be placed on each locomotive engine or interurban car, and such bell shall be rung or such whistle sounded by the engineer or fireman or motorman at the distance of at least five hundred yards from the place where the railroad crosses any public highway or street or traveled place, and be kept ringing or whistling until the engine or interurban car has crossed such highway or street or traveled place."

Now that is the law of this State. The railroad is required by law, when it is within five hundred feet—I believe it is feet isn't it?

Mr. DuRant: Yards.

The Court: Yards of a public highway or street or traveled place, to ring the bell or sound the whistle, or one or both, and to keep the bell ringing or the whistle sounding until they have crossed, and the failure to do so is made by the law negligence per se, which is negligence in itself. But it is not every negligence which subjects one [fol. 159] to payment of damages. In order for one to be liable for his negligence, it must be made to appear that that negligence was the proximate cause of the injury complained of. One might apprehend from the term "proximate cause" that it was the cause immediately preceding the event complained of. That may be so, but it is not necessarily so, nor is it always so. The proximate cause is the efficient cause, the cause that brought about the thing complained of. It may be, as I said, immediately preceding the event complained of, or it may originate at a point remote from the event complained of, but if it go down to the event complained of in an unbroken chain of casual events, then it would be the initial cause; it would be the proximate cause. Let me see if I can illustrate: Suppose a man is up on a platform high as this ceiling, and here is the street; he has set up a string of brick, one on its end right here, and others following on back, and through his negligence he knocks down this brick here, and that knocks the next one down, and so on down until that one on the edge is knocked down and it falls and hurts somebody down below; that is the brick that produced the injury, but the brick

down here being struck would be the cause. But if, after he struck that brick, some entirely independent cause broke in upon that chain of events, and set up an entirely different chain of events, causing the injury, this would not be the proximate cause. It is not only necessary to show negligence, but it is necessary to show that negligence was the proximate cause of the injury complained of.

It is a rule of law that one is not liable for the negligence of another with whom he is riding, unless they are engaged in a common enterprise; jointly interested in some common thing they are going to do and have a common purpose in view. In other words, if I am riding along the street in my [fol. 160] car and pick you up as a friend, and I am guilty of some negligence which subjects me to a collision, and you are hurt, and the other party is guilty of negligence too, my negligence would not defeat your recovery; couldn't impute my negligence to you. But if you and I are riding in the car with a common purpose in view, common enterprise in view, then my negligence would be imputed to you.

Section 4925, Volume 3, of the Code, provides as follows: "If a person is injured in his person or property by collision with the engines or any car or cars of a railroad corporation at a crossing, and it appears that the corporation neglected to give the signals required by this Chapter, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment, as provided in the preceding Section, unless it is shown that in addition to a mere want of ordinary care the person injured, or the person having charge of his person or property, was at the time of the collision guilty of gross or wilful negligence, or was acting in violation of the law, and that such gross wilful negligence or unlawful act contributed to the injury."

In other words, under that Statute, it is encumbent upon the plaintiff here first to prove that the crossing signals were not given, if they rely upon the crossing signals. I must say, however, that there are specifications of negligence, others that—but so far it relates to the failure to give the signals, the plaintiff must prove first that there was a failure to give the signals, and then she must prove, and prove both by the preponderance of the evidence as I have already charged you, that that failure to give the signals contributed to the injury of which she is complaining. If she has done that, the railroad, in order to exculpate itself,

[fol. 161] must show that the plaintiff in this case, or the person having charge of her person or property, contributed to the injury. In other words, if she has shown that there was a failure to give the signals, and that failure contributed to the injury she has suffered, nevertheless, if the railroad has shown you by the preponderance of the evidence, as I have charged you, that her own gross negligence, wilful conduct or unlawful act, or that the person having charge of her person or property brought about the accident, or contributed to it, as a proximate cause thereof, she could not recover in this case; the defendant would have exculpated itself from liability in damages.

Now, I have said to you that the railroad must exculpate itself in this matter. It is also a rule of the law that one, approaching a railroad crossing, must take due care for his own safety. No person can recklessly and negligently run into danger, if she or he has the means or opportunity of seeing the danger and thereby incur injury and hold another responsible. It is a rule of common sense as well as of the law that every person who has reached the age of discretion must take every reasonable precaution to protect himself from harm. That is common sense and the law is founded upon common sense.

Now, gentlemen, I have given to you in my words the law as it seems to me applies to this case. The plaintiff has asked that I give you certain requests to charge, which, in the main, are what I have already charged you in my general charge, but each party to the case has a right to have these propositions read to you if they are sound law, and to have them charged in their language. The plaintiff asks me to charge you, and I charge you:

1

"I charge you that the public has a right to be protected [fol. 162] where a highway crosses a railroad track, and that it is the duty of the defendants to keep a proper look-out." I charge you that coupled with what I have just said to you, that a person is required to keek a look-out and take precautions for his own safety.

2

"I charge you that where a public road crosses a railroad track and where people are likely to travel across, it

is the duty of a railroad, at common law, and outside of the requirements contained in the positive statutes of our State, in the operation of its trains, to keep such look-out and give such signals as a person of ordinary care and prudence would regard and deem reasonably proper and sufficient in view of the situation and surroundings, to put on their guard individuals who use the highway and crossing. And the failure to use such care for the protection of travelers on the highway would be negligence."

3

"I charge you that if the plaintiff has shown by the greater weight of the evidence that a failure or neglect of the defendants to give the signals in the manner provided and required by statutory law of this State at the crossing of the railroad tracks over the public road mentioned in the complaint was a proximate cause of the injury to Mrs. Ford, then the plaintiff would be entitled to receive all damages caused to her; unless the defendants have shown by the greater weight of the evidence—or it appears from the greater weight of the evidence—that in addition to a mere want of ordinary care of the plaintiff, or of any person having charge of her person, was at the time of the collision guilty of gross or wilful negligence; and that such gross or wilful negligence contributed to the injury of Mrs. Ford," or brought it about. I have so [fol. 163] charged you and I repeat it.

4

"I further charge you that failure to give the signals in the manner provided and required by the statute read to you is negligence per se, or negligence as a matter of law, and that such circumstances, if shown, may be considered with any and all other evidence in the case in considering the question of wilfulness. The statute requires that the whistle shall be kept sounding or the bell kept ringing until the engine has crossed the highway. Where the signals are not given as in the manner provided by statute, and an injury occurs at the crossing of railroad and public highway, a presumption would arise that the

failure to give the signals is the proximate cause of the injury. But such presumption would be rebuttable by evidence, and the jury should consider any and all evidence that may be in the case in determining the question of proximate cause." That is true. As I explained to you in connection with that statute just now, the failure to give these signals raises that presumption, but it is rebuttable; it is not a conclusive presumption. That may be rebutted by the defendants by its evidence, and as stated here, all the evidence must be considered in determining the question of proximate cause.

5

"I charge you that the negligence of the driver of an automobile will not be imputed to a person merely riding in a vehicle by invitation of an owner and riding gratuitously, unless such passenger assumed control or direction of the conduct of the driver, or had the right to do so. Such person must, however, exercise reasonable care for his own safety." One can't just sit up in an automobile or any other conveyance and see a person drive recklessly into danger and not stop him or warm him. A person [fol. 164] must exercise reasonable care for his own safety. And I charge you that in connection with what I have said to you about not imputing the negligence of the driver to the occupant of the car. It is not imputed or imputable if the other occupant of the car is merely a traveler by invitation as this request says. But if that other occupant of the car is engaged with the driver in a common enterprise and purpose, common intent, then he or she would have as much control over the car as the other, and it would be his or her duty to see that the car was driven with proper care.

6

"I charge you that the only defense that is available to a railroad which fails to give the statutory signals, where injury occurs by reason thereof as a proximate cause, is that the party injured, or the person having control of his person or property, was guilty of gross or wilful negligence, or was acting in violation of the law, and that such gross wilful negligence, or unlawful act, contributed to the injury." I have already charged you that and I repeat it.

Now the defendant has asked me to charge you certain requests which relate to those two defenses challenging the constitutionality of these two Section-, 4903 and 4925, which defenses I have overruled, and, therefore, these particular requests are not applicable here, and I do not charge them. But the defendant has asked me to charge you certain other requests which I will charge:

1

"There is no presumption that anyone has violated a criminal law such as the crossing statute in this case, but there is on the contrary a presumption of innocence, and the burden is on the plaintiff of proving that the statute [fol. 165] was violated." That is true and I so charge you.

I don't charge the second request of the defendant, because I don't think it is applicable here. It would be in case of an indictment of the railroad, but it is not applicable here.

Now, Mr. Foreman and Gentlemen, I hope I have made clear to you the principles of law which I think are applicable to this case. If the plaintiff is entitled to recover damages, what is the measure of damages? What is she entitled to recover? Damages are of two kinds; actual damages and punitive damages. Actual damages are those which compensate one for the injury one has suffered; sometimes called compensatory damages. In taking up the question of actual damages, you are entitled to take into consideration any loss of time, any pain and suffering which she has undergone, if any, and which she may reasonably be expected to suffer in the future, and in addition to that, any mental pain and suffering. Those are the measure of actual damages, if the plaintiff is entitled to recover actual damages, and if you find that she is also entitled to recover punitive damages, punitive damages are given to punish one for the wilful violation of the rights of another; not only to punish him for that, but to punish him for the violation of the rights of the public, and to deter him that he will not hereafter wilfully do the same thing. If the plaintiff is entitled to recover, she is entitled to whatever amount you find that the evidence warrants, not exceeding the amount asked for in the com-

plaint. If the plaintiff has failed to sustain the allegations of her complaint, so as to cast upon the defendants—and when I say allegations of the complaint, I mean as they pertain to the statutory signals—so as to cast upon the defendants the burden of proving that she has acted in such a way as to bar her recovery, or if the plaintiff has [fol. 166] failed to prove any of the other allegations of her complaint by the greater weight or preponderance of the evidence, your verdict will be for the defendants. Whatever verdict you find, Mr. Foreman, write it on the back of this paper styled summons and complaint. If you find that the plaintiff is entitled to recover actual damages, say "We find for the plaintiff so many dollars actual damages"—and if you also find that she is entitled to recover punitive damages, you say "and so many dollars punitive damages," separating them. If you find that she is not entitled to recover either actual or punitive damages, say "We find for the defendants." You can find a verdict against either one or both of these defendants. If it is against one, you will name the one. If you find that she is not entitled to recover anything against either one of them, say "We find for the defendants." You will have the right to any of these exhibits that you wish. Anything else, gentlemen?

Mr. DuRant: No, sir.

Mr. Davis: No, sir.

In Court of Common Pleas of Clarendon County

Verdict

The jury returned a verdict in favor of the plaintiff for Seventy-five Hundred ($7,500) Dollars.

In Court of Common Pleas of Clarendon County

Defendants' Motion for a New Trial

Mr. DuRant: If your Honor please, I want to move for a new trial on all of the grounds submitted in our motion

for a directed verdict, and also upon the evidence in the case.

(After argument for the motion, the Court ruled as [fol. 167] follows:)

The Court: I know exactly how you feel; I have been there myself, but I don't see any right I have to interfere with the verdict. I tried to charge that jury the law as I understand it, and the Constitution of the State makes them the sole judges of the facts. I don't think I can interfere with this verdict. I will have to let it stand.

In Court of Common Pleas of Clarendon County

Judgment

The issues in this action having been brought on for trial before Mr. Justice M. L. Bonham and a jury, at a Circuit Court, held on the thirtieth day of October, 1929, and the issues having been tried, and a verdict for the plaintiff having been duly rendered on the first day of November, 1929, and their costs having been adjudged at — Dollars,

Now, on motion of W. C. Davis, for said plaintiff, it is adjudged that the said plaintiff recover of said defendants Seventy-Five Hundred and no-100 Dollars, found by the jury, with — Dollars costs.

W. C. Davis, Plaintiff's Attorney.

Manning, S. C., November 11th, 1929.

R. L. Ridgill, C. C. C. P. (Seal of Court.)

In Court of Common Pleas of Clarendon County

Exceptions

1. The Court erred, it is respectfully submitted, in refusing to direct a verdict in favor of the defendants, for the reasons stated in the first three grounds of the motion, [fol. 168] which grounds were as follows:

(1) In that there is no proof of any negligence on the part of the defendants that caused the accident and alleged injuries to the plaintiff as a proximate cause thereof.

(2) In that there is no proof of any wilfulness on the part of the defendants that caused the accident and alleged injuries to the plaintiff as a proximate cause thereof.

(3) In that from the entire evidence it appears that the accident and alleged injuries to the plaintiff were due to her own negligence as a proximate cause thereof.

2. The Court erred, it is respectfully submitted, in refusing to direct a verdict in favor of the defendant railroad company on plaintiff's statutory cause of action, for the reason, as stated in the fourth ground of the motion, that Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, commonly known as the crossing statute, and which are made the basis of such cause of action, are unconstitutional, null and void, in that they constitute an unlawful regulation of interstate commerce in violation of Article I, Section 8, Subdivision 3, of the Constitution of the United States.

3. The Court erred, it is respectfully submitted, in refusing to direct a verdict in favor of the defendant railroad company on plaintiff's statutory cause of action, on the grounds, as stated in the fourth ground of the motion, that Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, commonly known as the crossing statute, are unconstitutional, null and void, in that they deprive such defendant of its property without due process of law [fol. 169] and deny to it the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States, for the reasons:

(1) In that the expressed and only purpose of Section 4925 as appears from its face is to give to a person injured in a railroad crossing collision a right of action against the railroad corporation, and in order to insure such injured person practically a certain recovery it relieves him of ordinary or simple negligence and notwithstanding this imposes an absolute liability on such corporation for the same kind of negligence if it should merely contribute to, and not cause, the injury, thereby working a gross discrimination

against the railroad corporation in favor of the vehicle or the traveler on the highway, and thus denying to the railroad corporation the equal protection of the laws and depriving it of its property without due process of law.

(2) In that, as appears from its face, Section 4925 allows a person injured in a railroad crossing collision to recover from the railroad corporation involved if such corporation's ordinary or simple negligence merely contributed to the injury without being its cause, and the only way in which the corporation can defeat a recovery is to show to the satisfaction of a jury "that in addition to a mere want of ordinary care the person injured, or the person having charge of his person or property, was at the time of the collision guilty of gross or wilful negligence, or was acting in violation of the law, and that such gross, wilful negligence or unlawful act contributed to the injury," thereby working a gross discrim-nation against the railroad corporation in favor of the vehicle or the traveler on the highway, and thus denying to the railroad corporation the equal protection of the laws and depriving it of its property without [fol. 170] due process of law.

(3) In that in a joint suit against a railroad corporation and the engineer of its train to recover for personal injuries received by a plaintiff in a collision at a railroad crossing between the vehicle in which he was riding and a train of the railroad corporation operated by its co-defendant engineer, such as is this case, the railroad corporation is by the terms of Section 4925 made liable for ordinary negligence which merely contributed to, not caused, the injury, with the only available defenses of proving to the satisfaction of a jury that the collision was due either to the gross wilful negligence of, or to a violation of law by, the plaintiff or the person having charge of his person, while under the same statute recovery is not permitted at all against its co-defendant engineer, through whom alone the railroad corporation acted, and there is still available to such engineer all defenses recognized by the common law, thereby working a gross discrimination against the railroad corporation, which operates to deny to it the equal protection of the laws and to deprive it of its property without due process of law.

(4) In that both freight and passenger motor vehicles operate as common carriers on the public highways of the state, and in so operating such vehicles and travelers therein are entitled to the benefits of Section 4925, which works a gross discrimination against railroad corporations, thereby denying to them the equal protection of the laws and depriving them of their property without due process of law.

(5) In that the said Sections 4903 and 4925, as construed by the Supreme Court of South Carolina, impose an unlawful burden and obligation upon the railroads in that simple negligence is by statute made evidence of wilful negligence [fol. 171] and also in that simple negligence is under the statute declared to raise a permanent presumption of fact that the same was the proximate cause of any injury which occurred, which presumption is to be given the effect of evidence to be weighed against opposing testimony and is to prevail unless such testimony is found by the jury to preponderate, thereby working a discrimination against the railroad corporation, which operates to deprive it of its property without due process of law and denies to it the equal protection of the laws.

(6) In that the said Sections 4903 and 4925, as construed by the Supreme Court of the State of South Carolina, raise unreasonable and arbitrary presumptions of fact that are to be given the effect of evidence to be weighed against opposing testimony and which are to prevail unless such testimony is found by the jury to preponderate, and that by reason thereof said sections work a gross discrimination against railroad corporations and deprive the defendant railroad company of its property without due process of law and deny to it the equal protection of the laws, and constitute an interference with interstate commerce.

(7) In that in all other suits under the laws of South Carolina against both individuals and corporations for personal injuries inflicted either negligently or wilfully, except the right of action especially given by Section 4925 to a person injured in a railroad crossing collision, there is no presumption whatever that the injury was due to the negligence of the defendant as a proximate cause, but the plaintiff in order to recover must prove, first, negligence or wilfulness on the part of the defendant, and second, that it was the proximate cause of his injury; for which

reason this statute, as construed by the Supreme Court of [fol. 172] the State, arbitrarily discriminates in favor of a vehicle or a traveler on the highway, and practically insures their safety at the expense of the railroad corporation, and thus denies to such corporation the equal protection of the laws and deprives it of its property withoue due process of law.

4. The Court erred, it is respectfully submitted, in charging the jury as follows:

"Now gross negligence is the failure to exercise slight care; the failure to exercise slight care. As distinguished from ordinary negligence, simple negligence, it is the intentional, conscious failure to do a thing that is incumbent upon one to do, or the doing of a thing intentionally that one ought not to do."

The error is that the definition thus given of gross negligence is incorrect, in that this definition makes such negligence depend on doing an intentional act, knowing at the time that the act is improper, which is a correct definition of wilfulness but not a correct definition of gross negligence.

5. The Court erred, it is respectfully submitted, in charging plaintiff's fourth request to charge as follows:

"I further charge you that failure to give the signals in the manner provided and required by the statute read to you is negligence per se, or negligence as a matter of law, and that such circumstances, if shown, may be considered with any and all other evidence in the case in considering [fol. 173] the question of wilfulness. The statute requires that the whistle shall be kept sounding or the bell kept ringing until the engine has crossed the highway. Where the signals are not given as in the manner provided by statute, and an injury occurs at the crossing of railroad and public highway, a presumption would arise that the failure to give the signals is the proximate cause of the injury. But such presumption would be rebuttable by evidence, and the jury should consider any and all evidence that may be in the case in determining the question of proximate cause. That is true. As I explained to you in connection with that statute just now, the failure to give these signals raises

that presumption, but it is rebuttable; it is not a conclusive presumption. That may be rebutted by the defendant by its evidence, and as stated here, all the evidence must be considered in determining the question of proximate cause."

The error in so charging is:

(1) The Court here charged that the failure to give signals required by Sections 4903 and 4925 is negligence per se and that "such circumstances may be considered with any and all other evidence in the case in considering the question of wilfulness," thereby permitting the jury to consider the failure to give signals as evidence both of negligence and wilfulness throughout the case, and not as being a mere temporary inference of fact that required the railroad company to go forward with its proof, and that vanished upon the introduction of opposing evidence.

(2) The Court here further charged that from testimony as to the failure to give the signals required by Sections [fol. 174] 4903 and 4925 for the crossing at which the collision and personal injury here involved occurred, "a presumption would arise that the failure to give the signals is the proximate cause of the injury," and left it to the jury to say whether such presumption had been rebutted, thereby giving such presumption the effect of evidence to be weighed against opposing testimony, and which presumption was to prevail unless such testimony was found by the jury to preponderate.

6. The Court erred, it is respectfully submitted, in refusing to charge defendants' third request to charge, which was as follows:

"It appears from the evidence that the train involved in the collision in this case was engaged in the transportation of interstate mail and interstate passengers, and was therefore as a matter of law engaged in interstate commerce. I charge you that the rights and obligations of a traveler on a highway approaching a grade crossing of a railroad and of a train engaged in interstate commerce approaching such crossing are such that the traveler can have no higher rights than the railroad company in the operation of such interstate commerce train. The Supreme Court of the United States has laid down these duties in these words:

" 'When a man goes upon a railroad track, he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows he must stop for the train, not the train stop for him. In such circumstances, it seems to us that if a driver can not be sure otherwise whether a train is dangerously near, he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look. It seems to us [fol. 175] that if he relies upon not hearing the train or any signal and takes no further precaution he does so at his own risk. We are dealing with a standard of conduct, and when the standard is clear it should be laid down once for all by the courts.'

"I charge you that this statement of the law is applicable to the facts of this case, and if you find the plaintiff did not take the proper precautions as laid down by the Supreme Court of the United States, your verdict must be for the defendants."

The error in refusing so to charge is that under the facts stated in this request, the rule of law declared by the Supreme Court of the United States in the Goodman case, which was quoted in the request, is the rule that the equal protection of the laws and the due process of law provisions of the Fourteenth Amendment to the Federal Constitution required should be applied to the conduct of the defendants and of the plaintiff with reference to the crossing involved in the suit, and such rule should have been given to the jury as the measure by which they should determine the question of liability under the facts of the case.

7. The Court erred, it is respectfully submitted, in refusing to charge defendants' fourth request to charge, which was as follows:

"I charge you that under a proper construction of Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, the failure to give at the highway crossing involved in this suit the signals required thereby (if there be such failure) affords no presumption whatever that such [fol. 176] failure was the proximate cause of the collision between the automobile in which plaintiff was riding and the train of the defendant railroad company, but plaintiff must prove what was the proximate cause of such collision and that the defendants were responsible therefor."

The error in failing so to charge is that Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, when properly construed, raise no presumption whatever as to what was the proximate cause of a collision between a railroad train and the vehicle of a traveler on a crossing, and the Court should so have instructed the jury, and in addition should have told them that the plaintiff was required to prove what was the proximate cause of the collision and to prove that the defendants were liable therefor.

8. The Court erred, it is respectfully submitted, in refusing to charge defendants' fifth request to charge, which was as follows:

"I charge you that under a proper construction of Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, as soon as the railroad company introduced evidence rebutting plaintiff's evidence that the signals required thereby were not properly given for the crossing involved in this suit, the temporary inference of fact arising from plaintiff's evidence completely vanished from the case and there is now no presumption whatever that the collision was caused by the negligence of the defendants as a proximate cause thereof, and it is incumbent on plaintiff to prove what was the proximate cause of such collision and that the defendants were responsible therefor."

The error in refusing this request is that the request states [fol. 177] the correct construction of Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, and therefore the defendants were entitled to have the jury so charged.

9. The Court erred, it is respectfully submitted, in refusing to charge defendants' sixth request to charge, which was as follows:

"I charge you that Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, commonly known as the crossing statute, in their operation upon railroad companies engaged in interstate commerce impose an unlawful burden upon such commerce and are therefore void under Section 8, Article I of the Constitution of the United States."

The error in refusing so to charge is that this request contained a sound proposition of law directly applicable to the

facts of this case and should have been given to the jury by the Court.

10. The Court erred, it is respectfully submitted, in refusing to charge defendants' seventh request to charge, which was as follows:

"I charge you that Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, commonly known as the crossing statute, are unconstitutional, null and void in that they deny to the defendant railroad company the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States."

The error in refusing so to charge is that this request contained a sound proposition of law directly applicable to [fol. 178] the facts of this case and should have been given to the jury by the Court.

11. The Court er-ed, it is respectfully submitted, in refusing to charge defendants' eighth request to charge, which was as follows:

"I charge you that Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, commonly known as the crossing statute, are unconstitutional, null and void, in that they deprive the defendant railroad company of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States."

The error in refusing so to charge is that this request contained a sound proposition of law directly applicable to the facts of this case and should have been given to the jury by the Court.

12. The Court erred, it is respectfully submitted, in refusing defendants' motion for a new trial for the reasons stated in the grounds of such motion, which were:

(1) That there was no evidence of any negligence or wilfulness on the part of the defendants as a proximate cause of plaintiff's injuries;

(2) That the entire evidence showed that plaintiff's injuries resulted from her sole negligence as a proximate cause thereof; and

(3) That as to plaintiff's statutory cause of action, Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, which afford the basis of such cause of action, are unconstitutional, null and void as constituting an unlawful burden on interstate commerce, in violation of Article I, Section 8, Subdivision 3, of the Constitution of the [fol. 179] United States, and as depriving the defendant railroad company of its property without due process of law, and as denying to it the equal protection of the laws, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

13. The Court erred, it is respectfully submitted, in refusing to charge the defendants' second request to charge, which is as follows:

"A violation of the crossing statute being a criminal offense, not only is there no presumption that it was violated but evidence of its violation must be sufficient to prove same beyond a reasonable doubt to entitle plaintiq to a verdict for damages for such violation."

The error in refusing so to charge lies in the fact that the said statute, as construed by the Supreme Court of this state, being a penal one in its nature and violations thereof punishable in the criminal courts by a fine and in civil actions by the denial of usual defenses, such as contributory negligence, and requiring the exercise of unusual and extreme presumptions of both law and fact against the defendant railroad company, the failure to prove same beyond a reasonable doubt constitutes a denial of due process of law as guaranteed by both State and Federal constitutions.

14. The defendant William Smith respectfully submits that the Court erred in charging plaintiff's third request to charge and also in the portion of the main charge as follows:

"If the plaintiff has failed to sustain the allegations of her complaint, so as to cast upon the defendants—and when [fol. 180] I say allegations of the complaint, I mean as they pertain to the statutory signals—so as to cast upon the defendants the burden of proving that she has acted in such a way as to bar her recovery, or if the plaintiff has failed to prove any of the other allegations of her complaint by

the greater weight or preponderance of the evidence, your verdict will be for the defendants."

And that the Court erred further in charging to the same effect in other portions of the general charge.

The error in so charging is that the crossing statute was thereby made to apply to the cause of action against him, and he was thus deprived of his defense of contributory negligence, when the crossing statute should have been held by the Court not to apply to any cause of action against him.

IN COURT OF COMMON PLEAS OF CLARENDON COUNTY

NOTICE AS TO RECORD

To Messrs. W. C. Davis and J. W. Wideman, attorneys for Respondent:

Notice is hereby given that the appellants propose the foregoing transcript of record as the case and exceptions on appeal in this case.

DuRant & Sneeden, Henry E. Davis, Attorneys for Appellants.

IN COURT OF COMMON PLEAS OF CLARENDON COUNTY

AGREEMENT AS TO RECORD

We hereby agree that the foregoing transcript of record [fol. 181] shall constitute the Case and Exceptions for appeal in this case.

DuRant & Sneeden, Henry E. Davis, Attorneys for Appellants. W. C. Davis, J. W. Wideman, Attorneys for Respondent.

[fol. 182] IN SUPREME COURT OF SOUTH CAROLINA

Case No. 847

KATHERINE H. FORD, Respondent,

v.

ATLANTIC COAST LINE RAILROAD COMPANY, et al., Appellants

Appeal from Clarendon County

M. L. Bonham, Judge

Affirmed

Henry E. Davis, of Florence, and DuRant & Sneeden, of Manning, for appellants.

W. C. Davis, of Manning, and J. W. Wideman, of Manning, for respondent.

Opinion No. 13405

OPINION—Filed May 11, 1932

MENDEL L. SMITH, A. J.:

On the first day of March, 1928, the plaintiff and her husband, George Ford, residents of Mockville, North Carolina, were returning from Charleston, South Carolina, to their home by way of Florence, in said State, in a sport model Buick touring car.

Owing to their unfamiliarity with this section of the state, construction and repair work in progress on several public highways in that section and the necessary use of various detour routes, they failed to pursue the most direct route to Florence, and were directed, upon inquiry, to continue their journey on public highway, designated as State Highway No. 26, which led through the towns of Manning and Alcolu about five miles apart. This highway crosses Black River Swamp near Manning and after emerging therefrom runs parallel to the track of the appellant railroad company which also crosses this swamp, curves to the left and is practically straight, with an unobstructed view, for about seventeen hundred yards.

At a point about twelve hundred yards from the swamp the railroad track is crossed by another public highway, designated as State Highway No. 4, which intersects highway No. 26 at a right angle at a distance of about sixty feet, according to a plat offered in evidence, from the railroad crossing.

On account of construction work on highway No. 26 between Manning and the City of Sumter, it became necessary for travellers to detour on No. 4 at the point of its intersection with No. 26 and cross the railroad track over the former.

The plaintiff and her husband followed this detour and while in the act of crossing over the railroad track was struck by one of the appellants' northbound passenger trains resulting in the injuries of which she complains.

This action was commenced on the sixth day of April, 1929, against the Atlantic Coast Line Railroad Company and William Smith, the engineer in charge of the locomotive at the time of the collision, to recover damages in the sum of twenty-five thousand dollars for the injuries alleged to [fol. 183] have been sustained by the respondent as a result thereof.

The complaint in substance charged a joint negligence and wilfulness on the part of the defendants in a number of specifications, one of which alleges a failure to give the signals when approaching a public highway crossing over a railroad track prescribed by Section 4903, Vol. 3, Civil Code of South Carolina, (1922), for the regulation of the operation of railroad trains in this state.

The defendants after certain admissions and denials of liability as charged in the complaint, set up in their answer as affirmative defenses (1) contributory negligence on the part of the respondents, (2) contributory wilfulness on their part; (3) that the train of the defendant involved in the collision was a regular through passenger train operating between the cities of Charleston and Greenville, South Carolina, and was, regularly, and on this particular occasion, actually engaged in interstate commerce and in the transportation of interstate passengers and mail and that sections 4903 and 4925, Vol. 3, Code of Laws of South Carolina, (1922), as construed by this Court, impose a burden

upon, and constitute an unlawful regulation of, interstate commerce in violation of Article 1, Section 8, Paragraph 3, of the Federal Constitution, vesting in the Congress the power to regulate commerce among the several states and (4) that said sections are in violation of the due process of law and equal protection of the law clauses of the Federal and State Constitutions.

The cause was tried on the issues thus raised at the October, 1929, term of the Court of Common Pleas of Clarendon County before the Hon. M. L. Bonham, Presiding Judge, and a jury.

The husband of respondent, who was driving the car at the time of the collision, testified, substantially, that rain had fallen on them practically during the entire trip from Charleston and that the day was misty and cloudy; that as he approached the detour sign at or near the intersection of these highways, he looked back to see if a train was approaching and saw nothing; that when he reached the detour sign on account of a "puddle of water" at the turn, he "immediately slowed down"; that when he was in — act of making the turn he looked through the side of the car, but saw nothing in that direction; that he then turned to look at the sign before crossing the track and then looked in every direction, at a distance not exceeding thirty feet from the crossing, to ascertain if a train was approaching but neither heard nor saw anything whatsoever indicating such approach; that at the time he made the turn into highway No. 4, he was not exceeding a rate of five miles an hour in speed, with the car "in neutral" and foot on brakes, which were in excellent condition; that he was scarcely moving at all when struck by the engine and that if he had received any warning of the approach of the train he could have easily stopped the car in one half the distance between the sign and the crossing.

The respondent testified, in substance, that they drove up to the crossing and seeing the detour sign pointing toward Florence and the "puddle of water" in the road they slowed up; that realizing they were near and alongside of a railroad track, but before crossing, they looked back for a train, and seeing nothing, looked at the sign and went on; that the curtains were up, but being a rainy, misty morning, she did the best she could to look for trains, which were hard to see; that she did not hear any whistle blow or a

bell sound as the train approached the crossing; that she was listening and as the motor of the car was running quietly, if the whistle had been blown or the bell sounded they could have heard it and that she did not see the train until about the time of collision in which she was rendered unconscious from her injuries.

[fol. 184] The defendant railroad company, in addition to testimony responsive to other issues involved, offered evidence tending to show that the train involved in the collision was a regular passenger train operating between the cities of Charleston and Greenville, South Carolina; that it was engaged regularly, and on this particular occasion, actually engaged in the transportation of interstate mail and passengers.

At the close of the testimony, the defendant submitted a motion for a directed verdict in its favor upon the grounds, briefly summarized, (1) that there was no proof of any actionable negligence on the part of the defendants; (2) that there was no evidence of wilfulness on their part; (3) that the evidence showed that the injuries complained of were due to the gross contributory negligence of the plaintiff as a proximate cause thereof and (4) that sections 4903 and 4925, commonly known as the crossing statute, as construed by this Court, constituted an unlawful attempt to regulate commerce among the States and were in violation of the due process of law and equal protection of the law clauses of the Federal and State constitutions, which motion was overruled by the Presiding Judge.

Certain requests to charge were then submitted to the Court embodying the legal propositions that had been urged against the constitutionality of the foregoing sections of the Code of Laws in the motion for a directed verdict, which instructions were denied by the Court.

The jury found a verdict for the plaintiff for the sum of seventy-five hundred dollars.

A motion for a new trial was made upon the insufficiency of the evidence adduced and upon all the grounds urged in support of the motion for a directed verdict, which was overruled.

Judgment for the plaintiff was duly entered upon this verdict and from this judgment this appeal is taken upon numerous exceptions which present for the consideration of

the Court but five controlling questions, namely, (1) whether the testimony adduced was sufficient in probative force to require a submission of the case to the jury; (2) whether the presiding Judge erroneously defined "gross negligence"; (3) whether sections 4903 and 4925, Volume 3, Code of Laws of South Carolina, (1922), as construed by this Court, are in violation of the due process of law clause of the State Constitution; (4) whether such sections, as thus construed, are in violation of the commerce regulation, due process of law and equal protection of the laws clauses of the Federal Constitution and (5) whether the presiding Judge was in error in charging and refusing to charge certain propositions.

The consideration of the Court will be directed first to those exceptions which present the question first stated in the foregoing enumeration.

A brief statement of some of the principles applicable to such cases and repeatedly sanctioned by a long line of decisions in support of each, renders wholly unnecessary any extended discussion of the testimony in a disposition of these exceptions contrary to the contention of the appellant.

It has never been held in this state that one about to cross a railroad track at a public highway or street crossing is under an absolute duty to stop, look and listen before going on said track, unless the exercise of ordinary care and prudence, under all the surrounding facts and circumstances, requires the adoption of such a course, and it is ordinarily a question for the jury to determine, in the application of the standard of due care, whether the attempt of a traveller to cross without looking or listening effectively was excusable or culpable. Zeigler v. Railroad Company, 5 S. C., 221; [fol. 185] Edwards v. Railroad Company, 63 S. C. 277; Bamberg v. Railroad Company, 72 S. C., 392; Chisholm v. Railway Company, 121 S. C., 402.

It may also be proper to observe at this time and in this connection that the Courts of this State, except, of course, when Federal questions are involved, are not controlled by decisions of the Federal Courts, notwithstanding the very high regard which is entertained at all times for such opinions and for the great ability and learning of the eminent jurists who pronounce them (State v. George, 119 S. C.,

120; Johnson v. Railroad Company, 142 S. C., 125; Key v. Railroad Company, 150 S. C., 35) and that the utterance of Mr. Justice Holmes, who delivered the opinion of the Court in the frequently cited case of Baltimore and Ohio Railroad Company v. Goodman, 275 U. S., 266, 48 S. Ct. 24, 72 L. Ed. 167, to the effect that it is the duty of the driver of an automobile before crossing a railroad track at a grade crossing, if not otherwise sure whether a train is dangerously near, to "stop and get out of his vehicle", has not been sanctioned and adopted in this state but on the contrary, for reasons, amongst others, so clearly and forcefully stated by Mr. Justice Bell, in the case of Georgia Railroad and Banking Company v. Stanley, 145 S. E. 530, has been expressly declared to be in conflict with our decisions. Key v. Railroad Company, supra; Holladay v. Railroad Company, 150 S. C., 243.

It is also well established in this jurisdiction that if the facts, which if true would constitute evidence of negligence, are controverted, or if not in dispute there may be a fair and reasonable difference of opinion as to whether the inference of negligence may be drawn therefrom, or if in controversy and the inferences properly deducible therefrom are doubtful, or if they tend to show both parties guilty of negligence or wilfulness and there may be a fair difference of opinion as to whose act produced the injury complained of as a direct and proximate cause, then the question becomes issuable and must be submitted to the jury under appropriate instructions. Osteen v. Railway Company, 76 S. C., 378; Miller v. Railroad Company, 140 S. C., 119.

It is equally well settled here as elsewhere that in the consideration of a motion for a non-suit, directed verdict or new trial by the defendant in his favor, the Circuit Judge is required to view the testimony most favorably to the plaintiff even though all the testimony offered by the latter may be contradicted by that of the defendant. Brogdon v. Railroad Company, 141 S. C., 238; McCutchen v. Insurance Company, 153 S. C., 401.

An application of these just and reasonable rules to the testimony adduced in this case under our many applicable and controlling decisions (Callison v. Railroad Company, 106 S. C. 129; Wideman v. Hines, 117 S. C., 519; Peeples v. Railway Company, 115 S. C., 119; Wheelis v. Railway Com-

pany, 118 S. C., 308; Bain v. Railroad Company, 120 S. C. 373; Chisolm v. Railway Company, 121 S. C., 404; Manning v. Railroad Company, 129 S. C., 391; Sauls v. Railroad Company, 129 S. C., 427; Reynolds Tobacco Company v. Railroad Company, 131 S. C. 208; Miller v. Railroad Company, 140 S. C., 119; McBride v. Railroad Company, 140 S. C., 255; Brogdon v. Railroad Company, supra; Whitehead v. Railroad Company, 153 S. C., 339) fully sustain the action of the Presiding Judge in submitting the case to the jury.

Even if the rule announced in the case of Baltimore etc., Railroad Company v. Goodman, 275 U. S., 66, were controlling in this case, it is apparent that a similar conclusion would have to be reached under a reasonable and common sense view of its application. In the latter case, the plaintiff was familiar with the crossing and surroundings. It was evidently a bright day and there does not appear in the record of the case the slightest suggestion of anything in the least calculated to distract his attention. In the case under consideration the day was dark, misty, and cloudy. The plaintiff and her husband were wholly unfamiliar with the crossing and surroundings. Owing to construction and [fol. 186] repair work on other highways, one of which would have furnished them a more direct route to his destination, they had wandered to an unknown route. These conditions made it necessary for them to take detour routes, the sign of one confronting them, according to the husband's testimony, not more than thirty feet from the crossing. The two highways referred to intersected upon the railroad right of way, all of which naturally created conditions and a mental attitude of inquiry and confusion quite different from that which appears in the Goodman case. In the latter case the record does not disclose any evidence whatsoever that Goodman looked or listened for an approaching train. In this case it was positive that both travellers looked and listened as well as they could under the circumstances. With an unobstructed view it is difficult to see how an observation made on such a day by the physical act of getting out of the vehicle would have been more effective than one made just thirty feet from and at the crossing. It is not believed that the Goodman case in its broadest intended scope of operation would hold the plaintiff in this case to such a degree of culpability as to defeat

her action upon the theory that she was directly and proximately responsible for her injury.

The second question imputes error in the definition of "gross negligence" given the jury by the Presiding Judge who instructed them on this question as follows:

"Now 'gross negligence' is the failure to exercise slight care; the failure to exercise slight care. As distinguished from ordinary negligence, simple negligence, it is the intentional, conscious failure to do a thing that is encumbent upon one to do, or the doing of a thing intentionally that one ought not to do."

This instruction relating to a definition of the words, "gross negligence" as used in the statute and characterized by the context, was in complete harmony with the many pertinent decisions in this State (Boyd v. Seaboard Air Line Railway Company, 65 S. C. 326; Glenn v. Railway Company, 145 S. C. 41) wherein it has been repeatedly held that such words indicate negligence so gross and reckless as to amount to wilfulness.

Our next inquiry is whether the sections assailed are in violation of the due process of law clause of the State Constitution (Article 1, Section 5) upon the grounds stated.

While an analysis of said sections, based upon the legislative intent as evidence by the textual language employed and the conclusions announced in our numerous interpretative decisions, is more essential in our final inquiry, it may for convenience be here stated with a degree, at least, of logical propriety.

Section 4903, Volume 3, Code of Laws, 1922, provides as follows:

"A bell of at least thrity pounds weight and a steam or air whistle shall be placed on each locomotive engine or interurban car, and such bell shall be rung or such whistle sounded by the engineer or fireman or motorman at a distance of at least five hundred yards from the place where the railroad crosses any public highway or street or traveled place, and be kept ringing or whistling until the engine or interurban car has crossed such highway or street or traveled place; and if such engine or car shall be at a standstill within less distance than one hundred

rods of such crossing such bell shall be rung or such whistle sounded for at least thirty seconds before such engine or interurban cars shall be moved, and shall be kept ringing or sounding until such engine or interurban cars shall have crossed such public highway or street or traveled place; Provided, That a gong of not less than ten [fol. 187] inches in diameter may be placed upon interurban cars in lieu of a bell as herein required and shall be sounded as herein provided."

Section 4925 provides:

"If a person is injured in his person or property by collision with the engines or any car or cars of a railroad corporation at a crossing, and it appears that the corporation neglected to give the signals required by this Chapter, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment, as provided in the preceding Section, unless it is shown that in addition to a mere want of ordinary care the person injured, or the person having charge of his person or property, was at the time of the collision guilty of gross or wilful negligence, or was acting in violation of the law, and that such gross, wilful negligence or unlawful act contributed to the injury."

Almost every phase of these enactments have been considered and construed by this Court.

From the earliest opportunity presented to the Court to its last utterance upon the subject, it has been uniformly and repeatedly held that a neglect to give the signals prescribed in Section 4903 is negligence per se. Petrie v. Railroad Company, 29 S. C. 303; White v. Railroad Company, 30 S. C. 218; Hankinson v. Railroad Company, 41 S. C. 19; Strother v. Railroad Company, 47 S. C. 381; Smith v. Railroad Company, 53 S. C. 121; Bowen v. Railroad Company, 58 S. C. 227; Drawdy v. Railroad Company, 75 S. C. 308; Turbyfil v. Railway Company, 83 S. C. 325; Callison v. Railway Company, supra, 106 S. C. 129; Keel v. Railroad Company, 108 S. C. 390; Wideman v. Hines, supra; Timmons v. Railroad Company, 138 S. C. 82; Miller v. Railroad Company, supra; Whitehead v. Railroad Company, 153 S. C. 339.

This interpretation of the failure to give the signals thus prescribed by the statutory law of the state is in full accord with the general rule of law established in a great majority of the jurisdictions in this country, to the effect that the violation of a penal or criminal statute is actionable negligence or as frequently stated is "negligence per se", or "negligence as a matter of law", although the defendant may also be subjected to a penalty or fine prescribed in the enactment. The principle upon which rule is based, stated generally, is that where a statute or municipal ordinance imposes a specific duty for the protection or benefit of others, if one fails or neglects to perform that duty one is liable to those for whose protection or benefit it was designed for any injuries of the character which the statute or ordinance was intended to prevent and which were proximately produced by such failure. 20 R. C. L., pages 38, 39.

This Court has never held that a mere failure to give the prescribed statutory signals was recklessness, wantonness or wilfulness per se, so as to warrant an award of punitive damages, but that the reasonable inference from such failure was sufficient to carry that issue to the jury for its determination. Mack v. Railroad Company, 52 S. C. 323; Osteen v. Railway Company, supra; Goodwin v. Railroad Company, 82 S. C. 327; Woodward v. Railway Company, 90 S. C. 266; Easterling v. Railroad Company, 91 S. C. 548; Sanders v. Railway Company, 93 S. C. 543; Kirkland v. Railway Company, 97 S. C. 72; Folk v. Railway Company, 99 S. C. 284; Ritter v. Railway Company, 106 S. C. 129; Keel v. Railroad Company, 108 S. C. 390; Wideman v. Hines, 117 S. C. 515; Miller v. Railroad Company, 140 S. C. 123; Key v. Railroad Company, 144 S. C. 164.

In the earlier cases of Wragge v. Railroad Company, 47 S. C. 105, and Strother v. Railroad Company, 47 S. C. 375, it was held that in an action to recover damages for an in- [fol. 188] jury sustained by one at the places contemplated in the statute, it was not necessary to show that negligence resulting from a failure to give the prescribed signals was the proximate or efficient cause of the injury, but that it was sufficient to show that such failure "contributed" to the injury in the sense of having "some share or agency in producing such result."

This construction of the word "contributed" as used in the statute has, however, been repudiated in subsequent cases, the Court clearly holding that, "When the law speaks of an act of negligence as contributing to an injury, it means as a direct and proximate cause thereof." Bowen v. Railroad Company, 58 S. C. 222; Burns v. Railway Company, 65 S. C. 229; Turbyfill v. Railway Company, 83 S. C. 325; Cable Piano Company v. Railway Company, 94 S. C. 143; McBride v. Railroad Company, 140 S. C. 260.

However this may be as a matter of judicial history, the chief concern is as to the final constructive and prevailing view of the Court on the meaning of the word "contributed" as used in the statute. Under the later decisions on the question the rule is unequestionably establishd that where one is injured in actual collision with a locomotive engine or cars on a public highway or street crossing or travelled place over a railroad track and there was a neglect to give the statutory signals it must appear that the failure to give the signals contributed as a proximate cause of the injury, but from such failure to give the signals a disputable presumption arises in the first instance that such failure was the proximate cause thereof. McBride v. Railroad Company, 140 S. C. 260; Brogdon v. Railroad Company, 141 S. C. 238; Glenn v. Railroad Company, 145 S. C. 41; Bowers v. Public Service Corporation, 148 S. C. 161; Edwards v. Railroad Company, 148 S. C. 266; Whitehead v. Railroad Company, 153 S. C. 339; Stabler v. Railroad Company, 160 S. C. 191.

In the case of Strother v. Railroad Company, supra, the Court further held that where there has been a failure to comply with the statutory requirements as to the prescribed signals and a person is injured while crossing a highway, street or travelled place, it will be presumed that such negligence caused the injury unless the testimony shows that it was caused in some other way. Of course, the causal connection here contemplated between the act of neglect and the injury was not that of a direct and proximate character, but only that the former had "some share or agency" in producing the latter, as the presumption could only relate to and furnish prima facie evidence of the causal connection held essential to the action.

In view of an apparent lack of harmony, certainly a measure of confusion, arising from seemingly conflicting

utterances in some of the prior decisions, Mr. Justice Stabler availed himself of an opportunity presented in the case of McBride v. Railroad Company, supra, to discuss these questions at some length and in a very lucid, able and elaborate opinion, in which a number of the cases were carefully and chronologically reviewed, states the conclusion of the Court on the nature of the causal connection contemplated in the statute as follows:

"Under the statute it must appear that the failure to give the signals contributed to the injury, and the decision of this Court holds that this means contributing as a proximate cause."

It is, therefore, quite evident that appellants' contention under the supposed authority of the cases of Circosky v. Smathers, 128 S. C. 358; McCown v. Muldrow, 91 S. C. 523, and Whaley v. Ostendorf, 90 S. C. 281; all of which were decided before the McBride case, to the effect that in this state in all cases ex delicto there must be proof of proximate cause except in collision cases at a crossing where a railroad is defendant, is in direct variance with the conclusion reached in the McBride case.

[fol. 189] With regard to the basis and nature of the presumption arising upon a failure to give such prescribed signals, the conclusion of the Court is thus stated:

"From our consideration of this question, we are satisfied that the proper construction of the statute leads to the conclusion that when a person is injured by a collision with the engines or any car or cars of a railroad corporation at a crossing, and the railroad failed to give the statutory signals at such time and place, the presumption arises that the failure to give the signals is the proximate cause of the injury, since such injury is the natural and probable consequence of the failure to give the signals and is the very injury intended to be prevented by the statute."

An affirmative avoidance of liability under the statute is concisely but comprehensively stated by Mr. Chief Justice Blease in the case of Glenn v. Southern Railway Company, 145 S. C., 48, 49, in this language:

"Under the specific terms of the signal statute, the common-law defense of contributory negligence is eliminated

from our consideration. The language of the Statute (Section 4925, Civil Code 1922), is that, if the failure to give the specified signals contributed to the injury, liability for all damages caused by the collision is imposed upon the railroad company, unless, 'in addition to a mere want of ordinary care,' it is shown that *gross* or *wilful negligence* or unlawful act, chargeable to the person injured, contributed to the injury. Negligence signifies inattention, or, in other words, an unconscious failure to realize the danger of the situation. Wilfulness signifies conscious disregard of consequences. The term 'gross negligence' does not stand by itself in the statute, but the context characterizes the meaning and gives it the significance of wilfulness. This was the construction given in Boyd v. Railway, 65 S. C., 326; 43 S. E., 817, to the use of the same term in the charge of the trial Judge, where, from its connection with the other language used in the charge, Mr. Justice Woods said that the meaning must be understood 'that it was not simply gross negligence, but negligence gross and reckless of consequences to such degree as to assume the nature of wilfulness.' "

It is therefore, obvious that under the decisions of this Court, only some of which have been referred to, interpreting these sections, a brief recapitulation discloses the following conclusions: (1) that a neglect to give the prescribed statutory signals is negligence per se; (2) that such failure, under the contemplated conditions is not recklessness, wilfulness or wantonness per se, but only affords the basis of an inference sufficient to carry the case, under proper instructions, to the jury for its determination of the question; (3) that upon such failure and resulting injury at the places stated therein, there is a rebuttable presumption, which will be discussed hereafter more fully, that such failure produced the injury as a proximate cause and (4) that in order to avoid liability, affirmatively, it is incumbent upon the offending corporation to show that at the time of the injury the person injured, or the person having charge of his person or property, in addition to a mere want of ordinary care, was "guilty of gross or wilful negligence, or was acting in violation of the law, and that such gross or wilful negligence or unlawful act contributed to the injury."

The exception raising the question of the constitutionality of the statute under the State Constitution however imputes error to the Presiding Judge in the single instance of refusing to charge the defendants' second request to charge, in which it is contended that the crossing statute, as construed by this Court, is also penal in character and violations thereof made punishable in the Criminal Courts by a fine; that the denial of the usual defense of contributory negligence and the application of "unusual and extreme presumptions of law and fact against the defendant railroad company", impose upon the plaintiff the burden [fol. 190] of proving such violation beyond a reasonable doubt before he would be entitled to a recovery and that in the absence of such proof a recovery would deny to the defendant company due process of law under the Federal and State Constitutions.

In the cases of Burckhalter v. Coward, 16 S. C., 435 and Gill v. Ruggles, 91 S. C., 90, the Court held that a plea of justification set up as a defense in an action for slander charging a criminal offense must be supported by evidence sufficient to convince the jury beyond a reasonable doubt of the commission of the alleged offense. A similar conclusion was reached with regard to a plea of justification in the making and publication of alleged libelous communication in the case of Duncan v. Record Publishing Company, 145 S. C. 196.

In the case of Murray v. Aiken Mining Company, 37 S. C., 768, it was held that in order to establish the liability of a surety on his bond for a breach of trust with a fraudulent intent on the part of the principal, the guilt of the latter would have to be shown by the same degree of proof that would be required to establish his guilt under a criminal indictment.

This case was overruled by implication in the case of Sally v. Globe Insurance Company, 133 S. C. 342, and expressly so in the case of Peurifoy v. Loyal, 154 S. C. 298.

In the case of Kirven v. Kirven, 160 S. E. 432, the action was based upon an alleged wilful, wanton and malicious assault upon the defendant, a woman, the taking without her consent of indecent liberties with her person and making of indecent proposals to her, acts when accompanied by the necessary intent, constitute some of the gravest offenses known to our criminal law.

It was held definitely and clearly in the latter case that the only "possible exception to the general civil rule that a plaintiff is required to prove the allegations of the complaint *by the preponderance of the evidence,* or the defendant his defense by a *like degree of proof*" is in support of a plea of justification where the action is one based on slander or libel in which a crime is therein charged against the plaintiff. Indeed, this is no exception to the general rule as applicable to the burden assumed by the plaintiff, as the exception to the general rule can only relate to the burden of the defendant.

It is, therefore, quite evident that the statute is free from any objection urged as violative of the State Constitution.

The next inquiry in our general summary of the questions presented is whether the statute violates the due process of law, equal protection of the law and the commerce clauses of the Federal Constitution with a number of ramifications embracing questions bearing directly on and essential to a proper decision of the main questions, all of which will be considered in the order named.

The Presiding Judge, an attorney of long experience and rare legal learning and one of the state's ablest Judges, since elevated to the membership of this Court, after careful consideration in his refusal of the motion for a directed verdict, denial of certain requests to charge and overruling the motion for a new trial, sustained, in complete harmony with our many Federal and State decisions, the constitutionality of the statute as not only a valid but a wise exercise of the police power vested in the state and upon an application of the analogies afforded by the case of Mobile etc. Railroad Company v. Turnipseed, 219 U. S. 35, as distinguished from the principles declared in the case of Western etc. Railroad Company v. Henderson, 279 U. S. 639.

[fol. 191] The attack upon the validity of the statute as obnoxious to the Federal Constitution, as construed and interpreted by this Court in these particulars and judicially viewed as of textual significance (Missouri etc. Railroad Company v. Nebraska, 164 U. S. 403; Cargill Company v. Minnesota, 180 U. S. 452; Lindsley v. Natural, 220 U. S. 61; Purity etc. Company v. Lynch, 266 U. S. 192; Price v. Illinois, 238 U. S. 446; St. Louis etc. Company v. Kansas City, 241 U. S. 419; Standard Oil Company v. Graves, 249 U. S. 389; Thornton v. Duffy, 254 U. S. 361; Ward v. Krinsky, 259

U. S. 503; Chicago etc. Railroad Company v. Risty, 276 U. S. 576), is based upon the contention:

1. That the statute does not provide due process of law in that (a) the sections under consideration, as interpreted by this Court, raise arbitrary and unreasonable presumptions which allow a recovery by the plaintiff without the proof of proximate cause and (b) by reason of the provisions of these sections the standard of conduct to be observed by a traveller and a railroad company in the use of a grade crossing laid down by the Supreme Court of the United States in the case of Baltimore and Ohio Railroad Company v. Goodman, 275 U. S. 66, is rendered inapplicable in this State.

2. That the statute embodying these sections denies to railroad companies the equal protection of the laws in that (a) proof of proximate cause is required in all tort cases except when such a company is the defendant in a crossing collision case, (b) that the railroad company is made liable for simple negligence resulting in injury at such crossings while the action of the traveller is not defeated unless he is guilty of wilfulness or is acting in violation of the law, (c) that the statute is not applicable to the engineer through whom the company acts and (d) the statute is not applicable to all common carriers involved in the identical transaction.

3. That these sections, as construed by this Court are also violative of the interstate commerce clause of the Federal Constitution and void.

While the police power of the States left to them and not directly restrained by the Federal Constitution (Slaughter Houses Case, 83 U. S. 36; Union Company v. Crescent City Company, 111 U. S. 746; Barber v. Connelly, 113 U. S. 27; Missouri etc. Railroad Company v. Hurnes, 115 U. S. 512; Yick Wo v. Hopkins, 118 U. S. 356; Missouri etc. Railroad Company v. Mackey, 127 U. S. 208; Jacobson v. Massachusetts, 197 U. S. 11; House v. Mayes, 219 U. S. 270) is incapable of exact definition (Beer Company v. Massachusetts, 97 U. S. 25; New Orleans Gas-light Company v. Louisiana Light and Heat Producing and Manufacturing Company, 161 U. S. 646) and cannot be aliened or abridged by them by contract or otherwise (Stone v. Mississippi, 101 U. S. 814; St. Louis etc. Railroad Company v. Matthews, 165

U. S. 1; Gas Light Company v. Drainage Company, 197 U. S. 453), yet it has been often held that the Fourteenth Amendment to the Federal Constitution does not operate as a limitation upon the States in the authorized exercise of this power to enact and enforce such laws as in their judgment will protect the health, morals, safety and general welfare of the public (Mugler v. Kansas, 123 U. S. 623; Minneapolis etc. Railroad Company v. Beckwith, 129 U. S. 26; St. Louis v. Fisher, 194 U. S. 361; Murphy v. People of California, 225 U. S. 623; Railroad Company v. Gibbs, 27 S. C. 286; Brown v. Thorpe, 74 S. C. 207; Simmons v. Telegraph Company, 63 S. C. 425) where such laws or regulations are not palpably arbitrary, unjust or unreasonable and do not unjustly or unreasonably impair private constitutional rights. Dutton v. Strong, 1 Black 23; Crowley v. Christensen, 137 U. S. 86; Lawton v. Steele, 152 U. S. 133; Railway Company v. Ellis, 165 U. S. 150; Connolly v. Union Sewer Pipe Company, 184 U. S. 540; Dobbins v. Los Angeles, 195 U. S. 223.

It has been so often determined, and the wholesome doctrine so long and generally recognized in both Federal and State jurisdictions, that all privileges and rights acquired by railroad companies are held subject to a valid exercise of the police power of the state, always subject to judicial [fol. 192] scrutiny, and that its legitimate exercise by the state is not in contravention of the due process of law clause of the Fourteenth Amendment, that the question cannot be regarded as now open to any serious consideration. McCandless v. Railway, 38 S. C. 507; Smith v. Alabama, 124 U. S. 465.

Under this uniformly recognized and sovereign power of the States in our American Constitutional system of government, various statutory enactments, regulations and municipal ordinances, pursuant to authorized delegation of authority, touching many phases of track construction, protection and maintenance, general equipment, the operation of trains, adequate methods of examination, inspection and supervision intended to promote the safety, protection and convenience of employee, passenger and the public, have been judicially upheld as free from the objections here urged.

As indicating the scope and limitation of the power and its valid exercise and application, regulations have been generally sustained in many state and Federal jurisdictions

that require railroad companies to change or alter the location of its track and to elevate or depress it, at its own expense, as a means of rendering travel on a highway safe (Denver etc. Railroad Company v. Denver, 250 U. S. 241; New York etc. Railroad Company v. Bristol, 151 U. S. 556); that prohibit the laying of more than a single track in a narrow, much-used street, although authorized by its franchise to lay a double track thereon (Denver etc. Railroad Company v. Denver, supra; Baltimore v. Baltimore Trust Company, 166 U. S. 675); that require the proper protection of the track by fencing (New York etc. Railroad Company v. Bristol, supra); that require the abrogation, at the expense of the company, of grade crossings by the elevation of their tracks at such places and the construction and maintenance of bridges and viaducts at public crossings (Denver etc. Railroad Company v. Denver, supra; Northern Pacific Railroad Company, v. Duluth, 208 U. S. 583; Chicago etc. Railway Company v. Minneapolis, 232 U. S. 430; Missouri etc. Railway Company v. Omaha, 235 U. S. 121); that require the construction of a side-walk over its track (Great Northern Railway v. Minnesota, 246 U. S. 434); that require the installation of safety devices (New York etc. Railroad Company v. Bristol, supra); that regulate the speed at designated places in the operation of trains (Crutcher v. Kentucky, 141 U. S., 47; Erb v. Moresch, 177 U. S. 584; Southern Railway Company v. King, 217 U. S., 524); that require the stopping of trains at certain designated stations (Lake Shore etc. Railroad Company v. Ohio, 173 U. S., 286); that require the proper heating of passenger cars (New York etc. Railroad Company v. New York, 165 U. S., 628); that provide for the examination and licensing of locomotive engineers (Smith v. Alabama, 124 U. S. 165); that authorize a reasonable attorney's fee as a part of the judgment in suits for damages for injuries due to communicated fires as a means of enforcing greater care in the operation of trains (Atchison etc. Railroad Company v. Matthews, 174 U. S. 96); that abrogate the fellow servant doctrine (Mobile etc. Railroad Company v. Turnipseed, 219 U. S., 35); that regulate the construction and use of a crossing (Railway Company v. Oklahoma, 271 U. S., 303); that regulate the manner of approach by trains to such crossings (Southern Railway Company v. King, 217

U. S. 524) and many other regulatory measures relating to specific subjects embraced in the general purpose of such legislation in connection with the railroad corporation and others engaged in various industrial and economic enterprises.

In the well considered case of Richmond etc., Railroad Company v. City of Richmond, 133 S. E., 800, which was an action against the city to recover one half of the cost of bridge building and construction work due in connection with the street crossings of its James River Division Line, the Court said, quoting from the case of Erie Railroad Company v. Commissioners, 254 U. S. 394:

[fol. 193] "Grade crossings call for a necessary adjustment of two conflicting interests—that of the public using the streets and that of the railroads and public using them. Generally the streets represent the more important interest of the two. There can be no doubt that they did when these railroads were laid out, or that the advent of automobiles has given them an additional claim to consideration. They always are the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent. Being places to which the public is invited, and that it necessarily frequents, the state, in the care of which this interest is and from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they should not be made *dangerous to the public,* whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power, or to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires. * * *"

In the cases of State v. Aiken, 42 S. C., 222, Stehmeyer v. City Council of Charleston, 53 S. C., 259; Mauldin v. City Council of Greenville, 53 S. C., 285, State v. Chemical Company, 71 S. C., 544; Insurance Company v. Jones, 78 S. C., 445, and Railroad Company v. Railroad Commission, 89 S. C., 472, this power has been discussed in some instances at great length, and numerous decisions reviewed

from other state and Federal jurisdictions and uniform sanction given to the principles stated and so generally recognized.

In the last case referred to the question presented was whether under the Constitution and laws of the state, the railroad commission had the right to refuse to permit one railroad to cross the tracks of another at grade. It was held that the legislature under a valid exercise of the police power, might prohibit such crossing, the conclusion of the Court being declared in the following language:

"Notwithstanding that section of the constitution, (Section 6, of Article 9, which gives to any railroad organized under the laws of this state the right to intersect with or cross any other railroad) it would be perfectly competent for the legislature, in the exercise of the police power of the state, to prohibit grade crossings altogether, and require all existing grade crossings to be changed, and be put above or below grade. New York, etc., Railroad Company v. Bristol, 151 U. S., 556, 38 L. Ed. 269; Chicago etc., Railroad Company v. Nebraska, 170 U. S. 57, 42 L. Ed. 948; Chicago etc., Railroad Company v. Illinois, 206 U. S., 561, 50 L. Ed. 596."

In the light and application of this universally accepted doctrine it is too obvious to warrant anything more than the mere statement of the proposition that Section 4903 is clearly embraced within a valid exercise of the police power of the state.

This section simply provides for the equipment of the locomotive engines and interurban cars with a bell and steam or air whistle, or gong in the case of an interurban car; that in the case of a moving train or car approaching a public crossing, street or travelled place the same shall be kept ringing or blowing for a prescribed distance before passing over the same, and in the event the car or train is standing a certain distance from the crossing or on the same, such signals must be given a certain length of time before moving.

Indeed, Mr. Justice Cothran, in the minority opinion, upon the authority of the cases of Atlantic Coast Line Railroad Company v. Georgia, Smith v. Alabama, 124 U. S., 465, Truax v. Corrigan, 257 U. S. 312, and Nashville etc.,

Railroad Company v. White, 278 U. S., 456, concedes the proposition in this language:

[fol. 194] "From this it is fair to conclude that Section 4903, which prescribes the signals to be given by a railroad corporation as its train approaches a highway crossing, is a public regulation, within the legislative power of a state, notwithstanding its direct effect upon trains employed in interstate commerce."

Again:

"It can hardly be questioned that Section 4903 is a valid exercise of the police power of the state and its constitutionality sustained."

But it is insisted that while the "vice is not in that section, but in Section 4925," the effect given it by the provisions of Section 4925 and the decisions of this Court construing and applying it, taken in connection with Section 4903, render both obnoxious to the clauses of the Federal Constitution invoked by the appellant.

As the contention of appellant on this phase of the constitutional attack upon the statute is in the main based upon the cases of Western Atlantic Railroad Company v. Henderson, 279 U. S., 639, and Baltimore and Ohio Railroad Company v. Goodman, 275 U. S., 66, and an effort to distinguish the case of *Mobile* Mobile, etc., Railroad Company v. Turnipseed, 219 U. S., 35, in which it was held that the Mississippi statute was free from the constitutional objections here urged, a more or less extended consideration will be given particularly to the former, upon which the most reliance is placed.

The plaintiff in that case brought an action to recover damages for the death of her husband who was killed near Tunnell Hill, in the state of Georgia, at a grade crossing of the public highway and the defendant's railroad, in collision between a motor truck and one of defendant's trains. The jury returned a verdict in her favor and the judgment entered thereon was affirmed in the Court of Appeals and in the Supreme Court of that state.

Section 27 A of the Georiga Civil Code provides as follows:

"A railroad company shall be liable for any damages done to persons, stock, or other property by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

The plaintaiff charged that the collision and death of her husband were caused by the negligence of the defendant and its employees in eight specifications of errors, all of which were denied by the defendant, who further alleged, that the deceased came to his death as a result of his own fault. The plaintiff proved the death of her husband in the collision and offered some evidence tending to show a dangerous condition of the crossing and a negligent maintenance thereof. She offered no evidence whatever, as appears in the record to support her other five allegations of negligence. The defendant offered much evidence to negative the specific acts of negligence charged against it and its employees in the complaint.

The instructions given the jury by the court included the following:

"When it has been made to appear that injury or damage has occurred by reason of the operation of the locomotive and train of cars of a railroad company, the presumption arises that the railroad company and its employees were negligent *in each of the particulars specified in the plain-*[fol. 195] *tiff's petition,* and the *burden* thereupon *shifts* to the *railroad company* to show that its employees exercised ordinary care and diligence *in the particulars wherein they are alleged to have been negligent,* and, unless, it does so, the fact of the *injury* or *damage,* having been made to *appear,* the plaintiff, suing for recovery of damages by reason of such injury, *would be entitled to recover.* * * * The burden is upon the plaintiff in this case to establish her contentions by a preponderance of the evidence. That is *subject to the qualification, already given you,* that, when the fact of the killing has been made to appear, the presumption arises that the defendant company was negligent in *each* of the *particulars specified* in the *petition,* and the

burden thereupon *shifts* to the *defendant company* to show that its employees exercised ordinary care and diligence *in such particulars.*" (Emphasis added.)

This instruction was affirmed, as already stated, by the Supreme Court of Georgia.

In commenting upon the same the Federal Supreme Court uses this language:

"Upon the *mere fact of collision* and resulting death, the statute is held to raise a presumption that defendant and its employees were *negligent* in *each* of the *particulars alleged,* and that *every act or omission in plaintiff's specifications of negligence was the proximate cause of the death,* and it makes defendant liable unless it showed *due care in respect of every matter alleged against it.* And, by authorizing the jury, *in the absence* of evidence, to *find negligence* in the operation of the engine and train, the court necessarily permitted the presumption to be considered and weighed as evidence against the testimony of defendant's witnesses tending affirmatively to prove such operation was not negligent in any respect." (Emphasis added.)

The contention of the plaintiff with regard to the interpretation of this statute is thus stated by the court:

"Appellee insists that Section 2780 is valid, and argues that the presumption, being one established by statute, has the effect of evidence, and that it is for the jury to decide whether the company's evidence is sufficient to overcome the presumption; that 'it should not as a matter of law be dissipated the instant any testimony is taken against it,' and that the issue is to be determined on a consideration of all the evidence *including the presumption.*"

Disposing of this contention the court said:

"Legislation declaring that proof of one fact or group of facts shall constitute *prima facie* evidence of an ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred. A *prima facie* presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. A statute creating a presumption that is arbitrary,

or that operates to deny a fair opportunity to repel it, violates the due process clause of the Fourteenth Amendment. Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty, or property. Manley v. Georgia, 279 U. S., 1, 49 S. Ct. 215, 73 L. Ed. —, and cases cited.

The mere fact of collision between a railway train and a vehicle at a highway grade crossing furnished no basis for any inference as to whether the accident was caused by negligence of the railway company, or of the traveler on the highway, or of both, or without fault of any one. Reason-[fol. 196] **ing does not lead from the occurrence back to its cause. And the presumption was used to support *conflicting allegations of negligence.* Plaintiff claimed that the engineer failed to keep a lookout ahead, that he did not stop the train after he saw the truck on the crossing, and that his eyesight was so bad that he could not see the truck in time to stop the train." (Emphasis added.)**

It is evident upon the most cursory view that the construction given the Georgia statute in the Henderson case by the highest tribunal in that state presents differences so vital as to destroy the analogies invoked as we will show.

In the first place under the Georgia statute the presumption assailed arises from the mere fact of the happening of the accident—the injury, while in our statute it only arises from the failure to give the statutory signals, declared to be negligence as a matter of law, admittedly a valid requirement in the exercise of the police power of the state and designed to prevent the injury.

The jury were instructed in the Henderson case, in conformity with the construction given the statute by the Supreme Court of Georgia that the moment the plaintiff made it appear or showed injury or damage by reason of the operation of the locomotive and train of cars of a railroad company, the presumption arises that the railroad company and its employees were negligent in each of the particulars specified in his complaint and the burden thereupon shifts to the railroad company to show that its employees exercised ordinary care and diligence in the particulars wherein they are alleged to have been negligent, and unless it does so, the fact of the injury or damage having been made to appear the plaintiff would be entitled to recover.

This instruction also suggests another very essential difference between the two enactments, for no such doctrine

as this has ever been declared or even remotely suggested in any of the decisions of this state interpreting or applying any provision of our statute, allowing a recovery against a railroad company in a complaint charging at least eight specified acts of negligence against its employees with absolutely no pretense of evidence offered except in support of three of these alleged acts, upon the principle that the mere proof of injury or damage raised a presumption of negligence on the part of the company and its operating employees with regard to each of the specified acts of negligence and imposed a shifting burden of exculpation. Such a view would have enabled the plaintiff to recover in that case on any one of the five specifications of negligence, unsupported by a scintilla of evidence, unless the defendant had shown affirmatively that it and its employees had exercised ordinary care and diligence in each of the particulars charged against them.

Under the established practice in this state the plaintiff may charge against the defendant in an action ex delicto as many acts of negligence or other wrongs as may properly arise out of the transaction under judicial investigation, as causing or contributing to the injury complained of without being required to make a separate statement thereof or to elect upon which act he will go to trial (Section 427, Code of Civil Procedure, 1922; Glover v. Railway Company, 57 S. C. 224; Machen v. Telegraph Company, 63 S. C. 363; Sloan v. Railway Company, 64 S. C. 389; Stewbridge v. Railway Company, 65 S. C. 440; Schumpert v. Railway Company, 65 S. C. 335; Dupre v. Railway Company, 66 S. C. 124; Bonner v. Telegraph Company, 71 S. C. 303; Machen v. Telegraph Company, 72 S. C. 261; Rountree v. Railroad Company, 73 S. C. 272; Barfield v. Coker, 73 S. C. 188; Tober v. Railway Company, 81 S. C. 317; Wichman v. Scarba, 101 S. C. 437; Miller v. Railroad Company, 140 S. C. 123) and may allege acts of negligence at common law as well as those arising under the statute, (Cooper v. Railway Company, 65 S. C. 214) in which event, as in other cases, where more than one act of negligence or other wrong [fol. 197] is charged, if supported by testimony, the plaintiff is entitled to have this whole case submitted to the jury under proper instructions (Section 427, Code of Civil Procedure, 1922) and recover such damages as he has sustained and arising from one or another or all of such acts or

wrongs alleged in the complaint. (Section 427, Code of Civil Procedure, 1922).

But in no case does this presumption arising from a failure to give the signals inure to his benefit "in each of the particulars alleged," in the complaint or be invoked "to support conflicting allegations of negligence," or afford prima facie evidence that "every act or omission in plaintiff's specifications of negligence was the proximate cause" of the injury or death, but only relates to the specific charge of failure to give the signals. If there was a neglect to give the signals no presumption arises as to any other specification of negligence, even though charged against the employees of the company in other particulars in the operation of the train, as was done in the present case.

These statutes, as thus construed by the highest tribunals of their respective states, clearly indicate the difference where the presumption is based upon a single fact, charged as an act of negligence likely to result in the injury, as in our statute, and where the presumption arises from the mere fact of injury or death and applies to all acts alleged.

In determining the character and effect of the presumption under our statute, as distinguished from that held to arise and operate under the Georgia statute, it must be observed at the outset that in order to maintain an action there under it is incumbent on the plaintiff to establish by the preponderance of the evidence (1) that the defendant railroad company operated a steam or electric railroad; (2) that such railroad was crossed by a public highway or street or travelled place whereon he had the legal right to travel; (3) that upon approaching said crossing there was a neglect to give the prescribed signals; (4) that there was an actual collision on such crossing with the engine or cars of the railroad company; (5) that he was actually injured while on said crossing in such collision and (6) that the failure to give the signals contributed to the said injuries as a proximate cause thereof.

So, it will be observed that it is only after the plaintiff has established the first five enumerated facts by the preponderance of the evidence, thereby discharging the burden placed upon him as in any other civil action to establish the material elements of the action, that the failure to discharge the legal duty to give the signals, raises a prima facie presumption, the nature of which we shall discuss

more fully hereafter, in the first instance, that such failure, contributing to an injury at the crossing and under the circumstances within the statutory contemplation, was the proximate cause thereof, without any shift of the burden ultimately (expressly declared to follow in the Georgia Statute) to establish such causal connection of proximate cause as an essential element of a recovery. If a prima facie presumption cannot be made to serve, under universally sanctioned principles, this purpose without invading grave constitutional inhibitions, as we shall further show, then the use of the presumption in the future must be discarded in the field of inferential proof with many reproachful and fruitless efforts to secure a reasonable and safe administration of justice in the Courts and judicial pathways of procedure venerable with age must be closed that have heretofore been available and supported by reason, long sanctioned practice, and, in many cases, demanded by the necessities of the transaction to defeat gross miscarriages of justice.

These differences are further emphasized when it is understood that no such presumption arises under the statute as that in the case of destruction of property by fire communicated by the engine of a railroad company passing along [fol. 198] its tracks or injury to a passenger or stock.

It is firmly established in this state that in actions at common law proof of damage to property caused by fire communicated by a railroad engine raises a prima facie presumption of negligence which casts the burden on the railroad company to show that its engine was constructed, equipped and managed with care (Wilson v. Railroad Company, 16 S. C., 588; Brown v. Railroad Company, 19 S. C., 39; Hutto v. Railway Company, 81 S. C., 567; Birt v. Railway Company, 87 S. C. 239) and in an action under Section 4910, Volume 3, Code of Laws, 1922, making a railroad liable for injuries to property by "fire communicated by its locomotive engine, or originating within the limits of the right of way of said road in consequence of the act of any of its authorized agents or employees," it is not even necessary to allege or prove negligence to establish liability, (Brown v. Railway Company, 87 S. C. 239) nor is such a statute imposing such liability an abridgement of the privileges or immunities of the railroad corporation, nor does it deprive it of its property without due process of law, nor

deny to it the equal protection of the laws, within the meaning of the Fourteenth Amendment to the Federal Constitution. McCandless v. Railroad Company, 38 S. C. 103; Brown v. Railway Company, 67 S. C. 481; Insurance Company v. Railroad Company, 41 S. C. 408; St. Louis etc. Railway Company v. Matthews, 165 U. S. 1; Atchison etc. Railroad Company v. Matthews, 174 U. S. 96.

According to the rule in this state when a passenger is injured on the train of a carrier through some agency or instrumentality of transportation, or some act of omission or commission of its servants, a presumption of negligence arises (Steele v. Railway Company 55 S. C. 589; Jarrell v. Railway Company, 58 S. C. 494; Doolittle v. Railway Company, 62 S. C. 142; Stewbridge v. Railway Company, 65 S. C., 447; Hunter v. Railway Company, 72 S. C., 340; Brown v. Railway Company, 83 S. C., 53; Williford v. Railway Company, 85 S. C., 301; McKittrick v. Traction Company, 88 S. C., 91; Conner v. Railroad Company, 105 S. C., 480) and such presumption continues throughout the trial of the case. Mack v. Railway Company, 52 S. C., 323; Ritter v. Railway Company, 83 S. C., 213; Williford v. Railway Company, 85 S. C., 301; McKittrick v. Traction Company, 88 S. C., 91.

Again, it was held at an early period in this state, 1851, from the obvious necessities of the case, that the mere proof of the killing of or injury to stock by the train of a railroad company in its passage along its track raises a presumption of negligence on the part of the company, which presumption remains throughout the trial of the case, is not affected by the introduction of testimony by the defendant, unless such evidence is sufficient to rebut it by an affirmative showing that the injury was due to accident, or was unavoidable, or free from negligence, in the absence of which, upon proof of ownership and value, the plaintiff is entitled to recover.

Zemp v. Wilmington & N. R. Co., 9 Rich. 93; Wilson v. Wilmington & N. R. Co., 10 Rich. 52; Murray v. South Carolina R. Co., 10 Rich. 227; Roof v. Railroad Co., 4 S. C., 61; Rowe v. Railroad Co., 7 S. C. 170; Jones v. Columbia & Greenville R. Co., 20 S. C. 249; Fuller v. Port Royal & A. R. Co., 24 S. C. 133; Walker v. Columbia & G. R. Co., 25 S. C. 141; Joyner v. South Carolina Ry. Co., 26 S. C. 52; Guess v. Railway Co., 30 S. C. 166; Molair v. Railroad Co.,

31 S C. 517; Salley v. Manchester & A. R. R. Co., 54 S. C. 480; Steel v. Southern Railway, 55 S. C. 391; Doolittle v. Southern Railway, 62 S. C. 137; Fowles v. Seaboard Air Line Railway, 73 S. C. 307; McLeod v. Atlantic Coast Line R. Co., 93 S. C. 72; Moorer v. Atlantic Coast Line R. Co., 103 S. C. 281.

Not a single case brought to our attention by attorneys for appellants and relied on in support of the proposition, sustains the characterization of the disputable presumption arising under the crossing statute to the effect that it remains "throughout the entire case" and is to be weighed as opposing evidence in fixing liability.

[fol. 199] Of the cases cited the cases of McLeod v. Railway Company, 95 S. C., 71, and Thompson v. Railroad Company, 113 S. C., 261, involved injuries to passengers; the cases of Matthews v. Railroad Company, 98 S. C., 204; Ervin v. Railroad Company, 106 S. C., 354, and Perryman v. Railroad Company, 105 S. C., 34 injuries to stock and the cases of Baker v. Telegraph Company, 57 S. C., 174 and Glenn v. Railroad Company, 96 S. C., 357, did not relate to this presumption as they were decided before the case of McBride v. Railroad Company, supra, in which case the presumption was defined.

A plain and fair comprehension of the McBride case, obvious and unambiguous in its forceful utterances, leaves no ground for misapprehension of the legal status of the presumption, in the light of our prior cases on the subject of inferential proof, as the following language by the learned Justice clearly shows:

"It must be borne in mind that this presumption does not mean that the causal relationship between the failure to give the signals and the injury is shown conclusively. The presumption merely establishes a *prima facie case*, which may be overcome by testimony, whether given for the *plaintiff* or for the *defendant*. This was made clear in the *Strother* case; and later, in the *Drawdy* case, it was held that the presumption in favor of the plaintiff was overcome by the testimony in favor of the defendant." * * * (Emphasis added.)

It does not necessarily follow, however, that the causal relationship must be shown, *in the first instance*, by evi-

dence, since, as in other cases, a presumption, if reasonable and well-founded, *may arise from the proven facts.* The rule as to causal relation between the violation of the statute and the injury is clearly stated in 20 R. C. L., at page 43, as follows:

"'The meaning of proximate cause in this connection has been explained as follows: If the injury complained of is a natural and probable consequence of violation of the statute, then that violation is correctly taken as the proximate cause of the injury. If the very injury has happ-ned which was intended to be prevented by the statute law, that injury must be considered as directly caused by the non-observance of the law. But if the injury is one that happened by causes independent of the violation of the statute, it is not actionable on the basis of that violation.'" (Emphasis added.)

There is absolutely no inconsistency, as the slightest reflection discloses, in the conclusions reached by the Court in the McBride case requiring the causal connection between the act of wrong and the injury to be a contribution in the sense of a proximate cause and the use of a rebuttable prima facie presumption to show, "in the first instance," the existence of such a connection. Where the prima facie presumption may be properly invoked in any case to operate in favor of one upon whom rests the burden of proof, it is necessary, as in this case, to establish the fact or facts upon which the presumption operates and ultimately the inference therefrom, if contradicted and an essential element of the particular action, in discharge of such burden, and such is the clear conclusion of Mr. Justice Stabler as expressed in the foregoing language.

In the case of Mobile etc., Railroad Company v. Turnipseed, 219 U. S. 35, to which a more extended reference will be made hereafter, the Court said:

"The law of evidence is full of presumptions either of fact or law. The former are, of course, disputable, and the strength of any inference of one fact from proof of another depends upon the generality of the experience upon which it is founded. For a discussion of some of the common law [fol. 200] aspects of the subject see Cincinnati etc., Railway v. South Fork Coal Company, 139 Fe. Rep., 528, et seq.

Legislation providing that proof of one fact shall constitute prima facie evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes, National and State, dealing with such methods of proof in both civil and criminal cases abound, and the decisions upholding them are numerous. Adams v. New York 192 U. S., 585; People v. Cannon, 139 N. Y., 32 (and others)."

In the case of Insurance Company v. Weide, 78 U. S., 438, the Court, discussing this question, said:

"It is well settled that if the evidence offered conduces in any reasonable degree to establish the probability of the fact in controversy, it should go to the jury. It would be a narrow rule, and not conducive to the ends of justice, to exclude it on the ground that it did not afford full proof of the non-existence of the disputed fact. Besides, presumptive evidence proceeds on the theory that the jury can infer the existence of a fact from another fact that is proved, and most usually accompanies it. Many of the affairs of human life are determined in courts of justice in this way, and experience has proved that juries, under the direction of a wise judge, do not often err in the reasoning which leads to a proper conclusion, the court has in its own hands the mode and measure of redress."

In determining the judicial effect of a presumption in a trial the "burden of proof" must not be confounded with a "presumption of fact".

The general rule is, in the absence of valid statutory enactment to the contrary, that the burden of proof rests upon him who has the affirmative of the issue and does not shift to the defendant even when aided, in the first instance, by a rebuttable presumption.

Under the cases of Sweeney v. Erving, 228 U. S., 240, Railroad v. Henderson, supra, and Railroad v. Turnipseed, supra, and many others, such a disputable prima facie presumption has been expressly declared not to violate the Fourteenth Amendment to the Federal Constitution that only "cast upon the company the duty of producing some evidence to the contrary"; that does not "under the guise of regulating the presentation of evidence preclude the party

from the right to present his defense to the main fact presumed"; that "does not operate to deny a fair opportunity to repel it"; that does not prevent the defendant from "going forward with his evidence on the particular point to which the presumption relates"; that only creates a liability in the absence of other evidence contradicting the same and that only makes the prima facie case sufficient, as a matter of law, in the case of default in such rebutting testimony.

So, it is evident, regardless of any doubt or uncertainty that may be thought to exist, if any, and we repeat that there is not the slightest ground therefor, since the McBride case and subsequent cases adhering to the rule therein declared, that the prima facie presumption of proximate cause arising in such cases from a failure to give the signals, regarded from the standpoint of either its basis, nature, the reasons supporting it, or procedural effect in the ultimate determination of liability, is not to be viewed, and has never been adjudged by this Court, as continuing throughout the trial of the cause and unaffected by the introduction of rebutting testimony as in the case of the presumptions of negligence in the operation or equipment of trains arising from the mere proof of the injury or killing of stock or passengers.

Such presumption cannot in any view be "used to support conflicting allegations of negligence" for the reason, as already shown, that it can only relate to the single act of an alleged and proven failure to give the signals, nor can [fol. 201] it be considered and weighed as opposing evidence for the purposes allowed under the Georgia statute as construed in the Henderson case. Such presumption only imposes, "in the first instance," the duty on the company of producing testimony to the contrary on the issue of proximate cause with every fair opportunity of so doing. It creates no legal liability against the railroad company except in default of contradictory testimony tending to overcome the same which may be "given for the plaintiff or for the defendant," under the express language of the McBride case, in which event the burden of proof does not shift, as required under the Georgia statute upon proof of the collision, from the plaintiff to establish such proximate cause by the evidence adduced, which, of course, may

be done by inferential or circumstantial as well as by direct or positive proof.

If this effect be denied then no presumption is applicable to any case and the term becomes an idle and meaningless one in the law of evidence.

A zealous effort to bring the statute under the denunciation of the Henderson case, which seems to be erroneously placed in this contention in a relation of judicial rivalry with the imputed infirmities of the McBride case in joint condemnation, leads the appellant into the wholly untenable position that the company in rebuttal of the plaintiff's case, is confined to the two affirmative defenses of wilful conduct or a violation of the law by the plaintiff at the time of the collision.

The fact can scarcely be deemed controversial that the presumption does not in the least preclude the company or cut it off from a fair opportunity of bringing forward all competent and relevant testimony arising out of and surrounding the transaction and of such evidentiary force as tends to negative the fact or inference of proximate cause, regardless of the conduct of the plaintiff. It may be true that in many cases such testimony would incidentally establish contributory fault on the part of the plaintiff or his agent, but the defendant is not confined to such evidence if other testimony is afforded by the occurrence, nor is it logical to conclude that if such testimony has the two-fold effect it must become as a matter of law so closely assimilated and confined to the one as legally to exclude it as relevant and competent testimony tending to negative the other.

It may also be quite true that the mere fact of collision or injury at a grade crossing furnishes no basis for any inference as to whether the accident was caused by the negligence of either party or both or without the fault of any one, for it may have been purely an accident or only avoidable by that infallible prudence, foresight, and judgment with which no human being is endowed, but is the same observation logically applicable to the reverse view of the proposition?

It certainly will not be questioned that an actual absence of knowledge of an approaching train bears a "rational connection" between such fact and resulting injury at a

crossing by the same train. Indeed, such fact, regardless of whether the traveller should have known, except in cases of utter heedlessness or irresponsible action, is probably the most fruitful cause of such collisions and injuries. If this be true then it naturally follows that the reason cannot revolt at the assumption of a "rational connection" between the failure to observe a requirement, amounting to a disobedience of the law, intended solely to give effective knowledge and warning of such approach and the strong probability of resulting injury.

The likelihood of injury from such cause is not more universally recognized than in the wholesome requirement of the common law, which imposes the duty on railroad companies in perhaps every jurisdiction in the union where that system of jurisprudence obtains (including the State [fol. 202] of Mississippi), and regardless of supplementary state and municipal enactments and regulations on the subject, to give to the public and individuals such warning of the approach of trains to public crossing- as will guard them against danger in the use thereof. Miller v. Railroad Company, 140 S. C., 163.

The existence of a "rational connection" between the failure of a railroad company to give adequate warning of the approach of a train to public grade crossing and the great probability of consequent injury to a traveller using the same, forcefully impressed by the facts and circumstances surrounding the present case, is nowhere more emphatically recognized and stated than by the Federal Supreme Court in its discussion in some of the cases of the respective duties and rights of the company and traveller at such crossings and the presumptions attaching to the conduct of the latter in using the same. Continental Improvement Company v. Stead, 95 U. S. 161; Texas & Pacific Railway Company v. Gentry, 163 U. S., 353; Baltimore etc., Railroad Company v. Landrigan, 191 U. S., 461.

In the first case mentioned, the Court speaking on this question, in part, said:

"If a railroad crosses a common road on the same level, those traveling on either have a legal right to pass over the point of crossing, and to require due care on the part of those traveling on the other, to avoid a collision. Of course,

these mutual rights have respect to other relative rights subsisting between the parties. From the character and momentum of a railroad train, and the requirements of public travel by means thereof, it cannot be expected that it shall stop for an approaching wagon to make the crossing first; it is the duty of the wagon to wait for the train. The train has the preference and right-of-way. But it is bound to give due warning of its approach, so that the wagon may stop and allow it to pass, and to use every exertion to stop if the wagon is inadvertently in the way. Such warning must be reasonable and timely * * *

The right of precedure referred to does not impose upon the wagon the whole duty of avoiding a collision. It is accompanied with and conditioned upon the duty of the train to give due and timely warning of approach. The duty of the wagon to yield precedence is based upon this condition * * *"

In commenting on the presumption that the law presumes that a person approaching a railroad crossing uses care, in the case last cited, the Court used this language:

"The presumption is founded on a law of nature. We know of no more universal instinct than that of self-preservation—none that so insistently urges to care against injury. It has its motives to exercise in the fear of pain, maiming and death. There are few presumptions, based on human feelings or experience, that have surer foundation than that expressed in the instruction objected to."

It is, therefore, quite evident that the Henderson case is not controlling in this case as it was the absence of such rational connection between the fact proved and the fact to be inferred—injury and negligence—that furnished the main ground of the decision in that case.

It may be observed further in connection with this question, and in emphasis of the distinction shown, that the inference of negligence from mere proof of injury is quite a different thing from the proof of both and an inference of causal proximate connection between the two, where one is likely to result in the other.

[fol. 203] While reasoning may not "lead from the occurrence back to its cause," yet it will not, and should not, be condemned as arbitrary if it should lead forward from an act of default, or back to it, so likely to result in injury in

the light of human experience and observation, as to necessitate, in the interest of the public safety, a legislative preventive measure and a prima facie presumption based thereon, as an additional sanction, to such injury. The Georgia statute, repudiated in the Henderson case, and the Mississippi statute, approved in the Turnipseed case, both lead from injury back but our statute from a likely cause forward and back.

Even if it were permissible, contrary to the foregoing conclusion, for the presumption under our statute to be considered and weighed as opposing evidence, still the Henderson case would be wholly inapplicable for the reason that it was held as the basic ground of that decision that there was no rational connection between a mere proof of collision, in the absence of evidence, and the alleged negligent acts charging the company with legal responsibility therefor, or that either party, or both, was presumed negligent in a given case from the mere fact of the occurrence, whereas under our statute such reasonable connection does exist between the specific fact of failure to give the signals established by the evidence, and the injury, also shown by the evidence, the reasonableness of which is not only confirmed by general experience but as above stated sanctioned by universal judicial recognition.

Indeed, the Federal Supreme Court has not only held time and again that such rebuttal presumptions, judicially declared to arise from a given state of facts, are not in contravention of the due process of law and equal protection of the law provisions of the Fourteenth Amendment to the Federal Constitution, but has fully recognized the power of a state legislature to create a "conclusive presumption" from a "given state of facts."

In the case of Jones v. Brim, 165 U. S., 180, in which Mr. Justice White, afterwards Chief Justice, delivered the opinion of the Court, and which may be regarded as one of the leading cases on the subject, the following enactment of the state of Utah was under review:

"Any person who drives a herd of horses, mules, asses, cattle, sheep, goats or swine over a public highway, where such highway is constructed on a hillside, shall be liable for all damage done by such animals in destroying the banks or rolling rocks into or upon such highway."

It was contended, and this was the sole question presented for the consideration of the Court, that the statute was a denial of the due process of law and equal protection of the law clauses of the Fourteenth Amendment, in that it made an unjust and unreasonable discrimination against persons who drove a "herd" of the animals therein named over a hillside public highway by subjecting them to damages done in the use thereof while all other persons were permitted to use such highways without such liability.

In denying this contention the Court pointed out clearly that the Amendment was intended only to prevent an arbitrary deprivation of life or liberty or an arbitrary spoliation of property; that it did not operate as a limitation upon the "subjects upon which the police power of the State may be lawfully executed"; that the "establishment, maintenance and control of public highways" were clearly embraced within the exercise of such powers and that the legislation obviously came within the "narrowest definition" of such power and should be "properly classed as a reasonable regulation incident to the right to establish and maintain highways."

[fol. 204] In applying the principles thus declared to a further discussion of the constitutionality of the statute, and more particularly in reference to the nature and extent of the legal presumption therein created, the Court said:

"It was obviously the province of the state legislature to provide the nature and extent of the legal presumption to be deduced from a given state of facts, and the creation by law of such presumptions is after all but an illustration of the power to classify. When the statute is properly understood, therefore, the argument of the plaintiff in error amounts to an assertion that the whole subject of the probative force to arise by operation of law, from any specified state of facts, is, in every sense, by the effect of the Fourteenth Amendment, removed from the jurisdiction of the local authorities.

"The statute being general in its application, embracing all persons under substantially like circumstances, and not being an arbitrary exercise of power, does not deny to the defendant the equal protection of the laws. Lowe v. Kansas, 163 U. S. 81, 88; Duncan v. Missouri, 152 U. S. 377. So, also, as the statute clearly specifies the condition

under which the presumption of neglect arises and provides for the ascertainment of liability by judicial proceedings, there is no foundation for the assertion that the enforcement of such ascertained liability constitutes a taking of property without due process of law."

If the legislature in our statute had in express terms created a legal presumption of proximate cause predicated upon a failure to give the signals instead of requiring the plaintiff to establish such contribution by the evidence, there being a direct, natural and reasonable connection between the act, the neglect to give the signals, and the injury, which the former is intended solely to prevent, it is difficult to understand wherein the exercise of such legislative power would be in the least antagonistic to the principles declared in the foregoing case.

The constitutionality of the crossing statute has been assailed in this state in the cases of Kaminitsky v. Railroad Company, 25 S. C., 53 and Drennan v. Southern Railway Company, 91 S. C. 504.

In the former case, decided April 24, 1886, the exceptions attacking the constitutionality of the statute under the Constitution of 1868, are not embodied in the report of the case, but it is apparent from the discussion that the power of the legislature to enact laws regulating the running of trains across public highways and to declare the omission of prescribed signals to be negligence was assailed, and that the proof of negligence from a mere failure to give the signals was a change of evidence made operative after the original grant of franchise to the company and only applicable to the corporations therein contemplated.

In the disposition of these objections, the Court said:

"But it is said that the provision in regard to the proof of negligence was not really an amendment of the charter, but a change in the law of evidence. If this were so, it would not make it unconstitutional. 'The right to have one's controversies determined by existing rules of evidence is not a vested right. Like other rules affecting the remedy, they must therefore at all times be subject to modification and control by the legislature'. Cool. Con. Lim. 452, 453. We do not, however, consider that by the afore-

said provision the main object of the legislature was to make a change in the law of evidence, but to induce compliance with the previous requirement as to signals. The rule of evidence as to negligence was made to apply only in case of failure to give the required signals, and it is manifest that the purpose was to give an additional sanc- [fol. 205] tion to the provision requiring the signals to be given.

Besides the matter of charter and vested right, Mr. Pierce says:

'A railroad company, although no power is reversed to amend or repeal its charter, is nevertheless subject, like individuals, to such police laws as the legislature may from time to time enact for the safety and health of citizens and the general convenience and good order. Its property and essential franchises are, indeed, protected by the Constitution; but the company itself is not thereby placed above the laws. It was not the design of that instrument to disarm the States of the power to pass laws to protect the lives, limbs, health, and morals of citizens and to regulate their conduct towards each other, and the mode of using property so that different owners may not injure each other. Such laws may incidentally impair the value of franchises or of rights held under contracts, but they are enacted diverso intuitu, and are not within the constitutional inhibition.' Pierce on Railroads, p. 460, and numerous authorities. Cooley Con. Lim. 710; People ex rel. Kimball v. B. & A. R. R. Co., 70 N. Y. 570; State v. Berlin, 21 S. C. 292; Messenger v. Penn. R. R. Co., 36 N. J. 407.

In the case last cited Chief Justice Beasley, of the Supreme Court of New Jersey, expressed it thus: 'A company of this kind is invested with important prerogative franchises, among which are the rights to build and use a railway, and to charge and take tolls and fares. These prerogatives are grants from the government, and public utility is the consideration for them. Although in the hands of a private corporation, they are still sovereign franchises, and must be used and treated as such. They must be held in trust for the general good.' We do not think it was error in law to hold that the sections aforesaid were constitutional."

In the case of Drennan v. Southern Railway Company, supra, it was held that section 2139 of the Code of 1902, new section 4925 of the Code of 1922, was not in violation of the due process of law and equal protection of the law clauses of the Federal and State constitutions in that it denies to the railroad companies therein mentioned the defense of ordinary contributory negligence in the cases stated therein, while it gives a cause of action for negligence to those injured, allowing the injured to recover when their own ordinary contributory negligence is a proximate cause of the injury and thereby imposing one standard for the railroad company and another for the traveller, the conclusion of the Court being thus stated:

"We proceed to consider, whether the said section is in violation of the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property, without due process of law.

"In construing section 2139 of the Code of Laws, the Court stated in Kaminitsky v. Ry., 25 S. C. 53, that the main object of that section, was not to make a change in the law of evidence, but to induce compliance with the statutory requirements, as to signals. But even if the intention of said section, was to change the rules of evidence, in the manner therein stated, it would not be repugnant to the provisions of the fourteenth amendment to the Federal Constitution, as to due process of law. Rules of evidence may be changed whenever the grounds for such change are reasonable. A conspicuous instance of such change, appears in section 15, article IX of the Constitution, which provides that 'knowledge by any employee injured, of the defective or unsafe character of any machinery, ways, or appliances, shall be no defense to an action for injury caused thereby, except as to conductors or engineers, in charge of dangerous or unsafe cars, or engines voluntarily operated by them.' Another instance of such change, appears in the act of Congress, approved the 11th of June, 1906, which provides, that in all actions brought against common carriers, to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of [fol. 206] contributory negligence, shall not bar a recov-

ery, where his contributory negligence is slight, and that of the employer was gross, in comparison, but the damages shall be diminished by the jury, in proportion to the amount of negligence, attributable to such employee. One reason for the change in the rules of evidence by section 2139 of the Code of Laws is, that in many instances the party colliding with the train of cars, is instantly killed, and the railroad company would have a decided advantage, if it was only required to prove, that the person injured was guilty of ordinary contributory negligence. The necessity of the case, requires proof of more than ordinary negligence, on the part of the person injured. A like necessity caused a change in the rules of evidence, where cattle were killed by a railroad train, as will be seen by the case of Danner v. Railway, 4 Rich. 329, in which it was held, that there was a presumption of negligence arising from the mere act of killing the stock."

If the statute be, as held in the McBride case, one of regulation "for the prevention of accidents and concerning the responsibility therefor"; if the "legislature evidently had in mind that injury to person or property was very likely to occur at a railroad crossing unless proper warning of the approach of trains was given to travellers, and intended by the statute to prevent such injury by requiring the railroad to give certain definitely described signals"; if the presumption as defined attaching to the proof of failure to comply therewith affords only an additional sanction to the provision requiring such signals to be given and an inducement to compliance with such requirement, then it is quite certain that the statute is clearly sustained under a valid exercise of the police power of the state and otherwise provides due process of law as against the objections urged in full conformity with the guarantee of the Federal Constitution as construed by the Federal Supreme Court and our own decisions.

We will now proceed to determine whether the statute is repugnant to the equal protection of the law clause of the Federal Constitution.

As many of the foregoing cases referred to in our discussion of the objections to the statute based upon an alleged violation of the due process of law clause also dispose of this question, any extended reference thereto would involve

a needless repetition and prolongation of this opinion, and our attention will for this reason be directed only to a brief consideration of a few of the cases that bear more directly on this specific question.

The contention seems to be, stated in a different form and in a more limited compass, that the statute works an unjust discrimination against railroad companies for injuries inflicted at the contemplated places in favor of vehicles, other common carriers, travellers, and its offending servants, upon whom the duty devolves to give the prescribed signals, using such crossings (1) in that the person or corporation is relieved of the legal consequence of simple or ordinary negligence while the railroad corporation is held liable for the same kind of negligence; (2) that the failure to give the signals under the statute is held by this Court to afford some evidence of wilfulness and raises a presumption of proximate cause of the resultant injury; (3) that such presumption is unreasonable and arbitrary as opposing evidence to be weighed against other evidence and is effective in support of a recovery by plaintiff except as against preponderating evidence and that (4) in all other actions by persons and corporations there is no such presumption.

It is sufficient to say without further comment that the last three questions are disposed of by our foregoing conclusions and the first narrowed to an inquiry as to whether the statute embodies an unjust or discriminatory classification in its application to railroad corporations.

A similar question was presented to this court in the case of Drennan v. Southern Railway Company, supra, [fol. 207] which seems to have escaped the attention of both parties to this controversy, and disposed of in this language:

"The rule as to classification, under the fourteenth amendment to the Federal Constitution, is thus clearly stated by the Court, through Mr. Justice Van Devanter, in the case of Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61:

'1. The equal protection clause of the fourteen- amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is

done, only, when it is without any reasonable basis, and, therefore, is purely arbitrary. 2. A classification having some reasonable basis, does not offend against that clause, merely because it is not made with mathematical nicety, or, because in practice, it results in some inequality. 3. When the classification in such a law, is called in question, if any state of facts reasonably can be conceived, that would sustain it, the existence of that state of facts, at the time the law was enacted, must be assumed. 4. One who assails the classification in such a law, must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.'

Section 2139 of the Code of Laws, was the outgrowth of the necessity for legislation, to protect the travelling public, at highway crossings, and it is peculiarly applicable to railways—in fact, it is difficult to conceive, *how any but railways*, could be included in the classification. This case, therefore, is embraced within the principles, announced in the case last mentioned."

In the case of Mobile, etc., Railroad Company v. Turnipseed, supra, the action was for damages by the personal representative for the killing of a section foreman in the service of the company.

The section of the Mississippi Code (Section 1885, Code of 1906), whose constitutionality was assailed under the Fourteenth Amendment to the Federal Constitution, is as follows:

"In all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of the locomotives or cars of such company shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury. This section shall also apply to passengers and employees of railroad companies."

The classification authorized by this enactment was challenged in that case as being repugnant to the equal protection of the law clause of the Federal Constitution but was sustained by the Court in the following language:

"The contention, shortly stated, is that although classification of railroad employees may be justified from general considerations based upon the hazardous character of the

occupation, such classification became arbitrary and a denial of the equal protection of the law the moment it is found to embrace employees not exposed to hazards peculiar to railway operation.

"But this Court has never so construed the limitation imposed by the Fourteenth Amendment upon the power of the state to legislate with reference to particular employments as to render ineffectual a general classification resting upon obvious principles of public policy because it may happen that the classification includes persons not subject [fol. 208] to a uniform degree of danger. The insistence, therefore, that legislation in respect of railway employees is repugnant to the clause of the Constitution guaranteeing the equal protection of the law merely because it is not limited to those engaged in the actual operation of trains is without merit. The intestate of the defendant in error was not engaged in the actual operation of trains. But he was nevertheless engaged in a service which subjected him to dangers from the operation of trains and brought him plainly within the general legislative purpose. The case in hand illustrates the fact that such employees, though not directly engaged in the management of trains, are nevertheless within the general line of hazard inherent in the railway business * * *"

Continuing the discussion of the subject, the Court further said:

"We are not impressed with the argument that the Supreme Court of Mississippi, in construing the Act, has declared that the effect of the statute is to create a presumption of liability, giving to it, thereby, an effect in excess of a mere temporary inference of fact. The statutory effect of the rule is to provide that evidence of an injury arising from the actual operation of trains shall create an inference of negligence, which is the main fact in issue. The only *legal effect of this inference is to cast upon the railroad company the duty of producing some evidence to the contrary.* When that is done the inference is at an end, and the question of evidence is one for the jury upon all the evidence. In *default of such evidence,* the defendant, in a civil case, must lose, *for the prima facie case is enough as matter of law.*

"The statute does not, therefore, deny the equal protection of the law or otherwise fail in due process of law, because *it creates a presumption of liability in the absence of other evidence contradicting such inference.*

"That a legislative presumption of one fact from evidence from another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be *some rational connection* between the *fact proved* and the *ultimate fact presumed,* and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to *preclude the party from the right to present his defense to the main fact thus presumed.*

"If a legislative provision not unreasonable in itself prescribing a rule of evidence, in either criminal or civil cases, does *not shut out from the party effected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue,* there is no ground for holding that due process of law has been denied him." (Emphasis added.)

Tested by these principles, the statute as construed and applied by the Mississippi Court in this case is unobjectionable. It is not an unreasonable inference that a derailment of railway cars is due to some negligence, either in construction or maintenance of the track or trains, or some carelessness in operation.

From the foregoing considerations it must be obvious that the application of the Act to injuries resulting from the 'running of locomotives and cars,' is not an arbitrary classification, but one resting upon considerations of public policy arising out of the character of the business."

In the case of Powell v. Pennsylvania, 127 U. S. 628, with a similar question under consideration, the Court, in part, declared:

[fol. 209] " 'Every possible presumption,' Chief Justice Waite said, speaking for the Court in Sinking Fund Cases, 99 U. S. 718, 'is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our

institutions depends in no small degree on a strict observance of this salutary rule.' See also Fletcher v. Peck, 6 Crouch, 128; Dartmouth College v. Woodward, 4 Wheat 518, 625; Livingston v. Darlington, 101 U. S. 407. * * * If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine as an article of food, the appeal must be to the Legislature, or to the ballot box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government.

The objection that the statute is repugnant to the clause of the Fourteenth Amendment forbidding the denial by the state to any person within its jurisdiction of the equal protection of the laws is untenable. The statute places under the same restrictions and subject to like penalties and burdens, all who manufacture, or sell, or offer for sale, or keep in possession to sell, the articles embraced by its prohibitions, thus recognizing and preserving the principle of equality among those engaged in the same business. Barbier v. Connelly, 113 U. S. 27; Soon Hing v. Crowley, 113 U. S. 703; Missouri Pacific Railway Co. v. Hurnes, 115 U. S. 512, 519."

It is claimed, however, that the statute is in violation of the Fourteenth Amendment to the Federal Constitution because motor vehicles carrying freight and passengers are entitled to the benefits of the crossing statutes while the railroads are thereby discriminated against, presumably, because these motor vehicles are not also subject to its provisions.

A complete and satisfactory answer to this view is found in the case of McCutcheon v. Railway Company, 81 S. C. 74, where this Court, quoting with approval from the cases of Johnson et al. v. Spartan Mills, 68 S. C. 339, and Simmons v. Tel. Co. 63 S. C. 430, said:

"Legislation is not unequal or discriminatory in the sense of the equality clause of the constitution merely because it is special or limited to a particular class. The decisions of the United States Supreme Court established that the Legislature has power to make a classification of persons and property for public purposes, provided such classification is not arbitrary and bears reasonable relation

to the purpose to be effectuated, and the equality clause is not violated when all within the designated class are treated alike.

"A classification may be reasonable which, for certain purposes, imposes liability upon a railroad as distinguished from other common carriers. Ry. v. Mackey, 237 U. S. 295; St. Louis etc. Ry. Co. v. Matthews, 165 U. S. 1."

In sustaining the constitutionality of an act of the Missouri legislature establishing the liability of any railroad corporation for injury to property by a communicated fire, either directly or indirectly, against this objection, the Court after an elaborate review of similar statutes and others relating to the public safety, health and morals in many states, including the South Carolina fire statute, and interpretative decisions, in the case of St. Louis etc. Railway Company v. Matthews, 165 U. S. 1, uses this language:

"The objection that the statute of Missouri violates the clause of the Fourteenth Amendment, which prohibits a state to deny to any person within its jurisdiction the equal [fol. 210] protection of the laws, is as untenable as that which we have considered. The statute makes no discrimination against any railroad company in its requirements. Each company is subject to the same liability, and from each the same security, by the erection of fences, gates and cattle-guards, is exacted, when its road passes through, along or adjoining enclosed or cultivated fields or unenclosed lands. There is no evasion of the rule of equality, where all companies are subjected to the same duties and liabilities under similar circumstances. 115 U. S., 523.

Like decisions, for like reasons, were made in the similar cases of Minneapolis & St. Louis Railway v. Beckwith, 129 U. S., 26, and Same v. Emmons, 149 U. S. 364, in which last case this court, again speaking by Mr. Justice Field, said: 'The extent of the obligations and duties required of railway corporations or companies by their charters does not create any limitation upon the State against imposing all such further duties as may be deemed essential or important for the safety of the public, the security of passengers and employees, or the protection of the property of adjoining owners. The imposing of proper penalties for the enforcement of such additional duties is unquestionably

within the police powers of the States. No contract with any person, individual or corporate, can impose restrictions upon the power of the States in this respect.' 149 U. S., 367, 368.

In Missouri Pacific Railway v. Mackey, 127 U. S., 205, the judgment of the Supreme Court of Kansas in 33 Kansas, 298, maintaining the constitutionality of a statute of the state, imposing for the future upon every railroad corporation, organized or doing business in the state, a liability, to which no person or corporation was before subject, for all damages done to any of its employees by negligence or mismanagement of their fellow-servants, was affirmed by this Court, saying: 'The hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees, as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employees; and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity *and all railroad corporations are, without distinction, made subject to the* same liabilities. As said by the court below, it is simply a question of legislative discretion whether the *same liabilities* shall be applied to *carriers by canal and stage coaches,* and to *persons* and *corporations* using steam in manufacturies." (Emphasis added.)

In the case of Watson v. State of Maryland, 218 U. S., 173, a Maryland legislative enactment requiring the registration of physicians and surgeons, applicable in terms only to those engaged in the practice prior to a certain date, an exemption from its operation under stated conditions of certain resident and non-resident physicians, was vigorously assailed upon the ground that undue discrimination was shown in these exceptions; that the classification made was unreasonable and arbitrary and the equal protection of the laws denied.

In denying this contention the Court declared:

"It was therein held (referring to the case of Williams v. The State of Arkansas, 217 U. S., 79) that regulations of a particular trade or business essential to the public health and safety are within the legislative capacity of the State

in the exercise of its police power, and that unless such regulations are so unreasonable and extravagant as to interfere with property and personal rights of citizens, unnecessarily and arbitrarily, they are within the power of the [fol. 211] State; and that the classification of the subjects of such legislation, so long as such classification has a reasonable basis and is not merely arbitrary selection without real difference between the subjects included and those omitted from the law, does not deny to the citizen the equal protection of the laws."

Were it deemed essential to the further vindication of the statute against this assault, numerous other cases might be referred to in which this doctrine is uniformly approved and reiterated by the Federal Supreme Court.

As the statute imposes the prescribed duties on "each locomotive engine or interurban car" whose track is crossed by a public highway, street or travelled place; exacts from each the same security in the interest of the public safety; relates to all persons using the latter at such designated places and subjects the company to the "same duties and liabilities under similar circumstances," we are at a loss to conceive wherein the statute is violative of any phase of the equal protection of the law clause of the Federal Constitution upon the grounds stated.

In so far as the exceptions are based upon an alleged difference in the standard of care or rule of evidence required of the injured person and the corporation at such places, it is sufficient to state that the identical question was raised in the case of Drennan v. Southern Railway, supra, and disposed of in the reasoning and conclusion of that case not in the least conflict with any of the Federal Supreme Court decisions on the subject.

But it is contended further that the statute is in violation of the clause of the Federal Constitution that devolves upon the Congress alone the right to regulate commerce between the States.

Assuming that the appellant's train was, at the time and place of respondent's injuries on said public highway crossing, engaged in interstate commerce (Gladson v. Minnesota, 166 U. S., 427; International etc. Company v. Pigg, 217 U. S., 91; Galveston etc. Railroad Company, 254 U. S., 357) it is well settled by numerous decisions of the Federal Supreme Court that in the absence of Congressional enact-

ment on the subject, the states are not denied the power to promote by legislative enactment safety in the physical operation of railroad trains within their territory, even though engaged in interstate commerce, provided such requirements are not "arbitrary; or pass beyond a fair judgment of what the exigency demands." Southern Railway Company v. King, 217 U. S., 524; Atlantic etc. Railroad Company v. Georgia, 234 U. S. 280.

In discussing the subject of the "extent of the power and the occasions for its exercise" and in the determination of the power of the state over commerce, the general subject has been divided into three classes: First, those in which the power of the state is exclusive; second, those in which the states may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the state cannot act at all. Bridge Company v. Kentucky, 154 U. S., 204; Telegraph Company v. Jones, 162 U. S., 650; Southern Railway Company v. Reid, 222 U. S., 424.

It is also well settled that in the absence of Congressional enactment or a valid and controlling regulation of the Interstate Commerce Commission, under its Congressional grant of power on the subject, and no such act or regulation has been brought to our attention, the police power of the state can be validly exercised on many occasions to insure the faithful and prompt performance of duty within its limits on the part of those engaged in interstate commerce and that the exercise of such power is in aid of interstate commerce and does not burden it though incidentally affecting it. Railway Company v. Mazursky, 216 U. S., 222; Telegraph Company v. Jones, 162 U. S., 650; Telegraph [fol. 212] Company v. Milling Company, 218 U. S., 406; Missouri etc. Railroad Company v. Larabee Mills, 211 U. S., 612; Railway Company v. Reid, 222 U. S., 424; Stone v. Loan and Trust Company, 116 U. S., 304; Smith v. Alabama, 124 U. S., 465; Hennington v. Georgia, 163 U. S., 299; New York etc. Railroad Company v. New York, 165 U. S., 628; Gladson v. Minnesota, 166 U. S., 427; Smith v. Alabama, 124 U. S., 465.

In the course of an able and elaborate opinion by that venerable and able jurist, Mr. Justice Holmes, in the case of Erie Railroad Company v. Board of Public Utility Com-

missioners, 254 U. S., 394, in which the City of Patterson in promotion of the public safety undertook to require the railway company to separate grades at a number of crossings at a great expense, and in which the usual defenses of violation of the due process of law, equal protection of the law, contract impairment, privilege and immunity abridgment and interstate commerce clauses of the Federal Constitution were invoked, said, in part, in response to the last contention:

"If it reasonably can be said that safety requires the change it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil Denver & Rio Grande R. R. Co. v. Denver, 250 U. S., 241, 244, 39 S. Ct. 450, 63 L. Ed. 958; Union Dry Goods Co. v. Georgia Public Service Co., 248 U. S., 372, 39 S. Ct. 117, 63 L. Ed. 309, 9 A. L. R. 1420); Louisville & Nashville R. R. Co. v. Mottley, 219 U. S., 467, 31 S. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671; Northern Pacific Railway Co. v. Duluth, 208 U. S., 583, 28 S. Ct. 241, 52 L. Ed. 630; Manigault v. Springs, 199 U. S., 473, 480, 26 S. Ct. 127, 50 L. Ed. 274. If the burdens imposed are so great that the road cannot be run at a profit, it can stop, whatever the misfortunes the stopping may produce. Brooks-Scanlon Co. v. Railroad Commissioners, 251 U. S., 396, 40 S. Ct. 183, 64 L. Ed. 323."

In the case of Smith v. Alabama, supra, Mr. Justice Matthews, delivering the opinion of the Court, in part, said:

"It is to be remembered that railroads are not natural highways of trade and commerce. They are artificial creations; they are constructed within the territorial limits of a State, and by the authority of its laws, and ordinarily by means of corporations exercising their franchises by limited grants from the State. The places where they may be located, and the plans according to which they must be constructed, are prescribed by the legislation of the State. Their operation requires the use of instruments and agencies attended with special risks and dangers, the proper management of which involves peculiar knowledge, training, skill, and care. The safety of the public in person and property demands the use of specific guards and precau-

tions. The width of the gauge, the character of the grades, the mode of crossing streams by culverts and bridges, the kind of cuts and tunnels, the mode of crossing other highways, the placing of watchmen and signals at points of special danger, the rate of speed at stations and through villages, towns, and cities, are all matters naturally and peculiarly within the provisions of that law from the authority of which these modern highways of commerce derive their existence. The rules prescribed for their construction and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the limits of the local law. *They are not per se regulations of commerce;* it is only when they operate as such in the circumstances of their application, and conflict with the expressed or presumed will of Congress exerted on the same subject, that they can be required to give way to the supreme authority of the Constitution."

Indeed, it may be said, in view of the unquestionable [fol. 213] power of the states under the cases discussed, to which may be added many more, that the exercise of such power as manifested in the provisions of the statute, so far from being an unreasonable, unjust and arbitrary burden upon and interference with interstate commerce by railroad transportation, is in legislative intent, judgment and application directly in aid thereof, for it must be apparent that a compliance with the duty to give the prescribed signals at such places as the public have the legal right to cross can only lessen the probability of accident resulting in loss of property, injury and death and consequent interruptions and delays in interstate journeys, prompted at least by the natural instincts and promptings of humanity in case of such happenings, and to possible injuries to operating equipment, derailments and other obvious circumstances.

As these sections, as construed by this Court, are maintainable upon the foregoing views, with other reasons that might be offered if deemed necessary, it is evident without further comment that the contention that such sections prevent the adoption and operation of the rule announced in the Goodman case, in alleged violation of these clauses of the Federal Constitution, is entirely without merit.

The foregoing views and conclusions fully support the Circuit Judge in sustaining the Constitutionality of these sections of the Code of Laws against the attack made thereon.

It is too well settled to warrant the citation of authority that in his charge to the jury the Presiding Judge is not required to adopt the language of any specific request submitted in stating the legal proposition embodied therein, if the same is applicable to the issues properly involved and covered in his general charge.

An application of this principle to the very full, clear and satisfactory charge in this case, readily seen to be in substantial accord with the views herein announced, renders it free from the remaining imputed vices.

The jury were fully instructed on the essentials of the action, the issues involved, negligence, contributory negligence and wilfulness, the respective duties of the company and traveller, under the statute and at common law, upon approaching a highway crossing, the burden of proof resting on each and the basis and measure of damages, in the course of which they were specifically instructed that it was "not every negligence which subjects one to payment of damages" but that "it is necessary to show that negligence was the proximate cause of the injury complained of"; that under the statute the plaintiff must not only prove the failure to give the signals but the causal connection between such failure and the alleged injury and must prove "both by the preponderance of the evidence"; that while a presumption of proximate cause arises from a failure to give the signals, such presumption is and would be rebuttable by evidence and the jury "should consider any and all evidence that may be in the case in determining the question of proximate cause"; that there was a presumption of innocence in favor of the company with regard to the violation of the statute and that the "burden is on the plaintiff of proving that the statute was violated."

These extracts, with numerous others that might be cited, from the charge, which, in justice to the Presiding Judge and the parties litigant, must be considered as a whole, impress it as a fair and adequate declaration of the law on all relevant phases of the controversy.

In order to induce to a clear understanding of the questions herein presented, considered and decided, the ex-

ceptions too numerous to be considered seriatim, requests to charge that were denied by the Presiding Judge and the charge of the latter should be incorporated in the report of the case.

[fol. 214] All the exceptions presented have received the careful consideration of the Court and are overruled.

Wherefore, it is the judgment of this Court that the judgment of the Circuit Court be, and the same is, hereby affirmed.

Blease, C. J.; Stabler and Carter, JJ., and Circuit Judges T. S. Sease, H. F. Rice, W. H. Townsend, C. C. Featherstone, J. Henry Johnson, E. C. Dennis, C. J. Ramage, G. B. Greene, Philip H. Stoll, G. Dewey Oxner, concur. Circuit Judge M. M. Mann, concurs in result. Circuit Judges S. W. G. Shipp and W. H. Grimball, dissent.

IN SUPREME COURT OF SOUTH CAROLINA

CONCURRING OPINION

M. M. MANN, Circuit Judge (concurring in result):

With only the constitutional questions argued before the Court en banc I feel that the reasoning of the Federal Supreme Court in the Turnipseed case, while not conclusive, is sufficiently suggestive to warrant my concurrence in that part of the leading opinion which treats these questions.

IN SUPREME COURT OF SOUTH CAROLINA

DISSENTING OPINION

W. H. GRIMBALL, Circuit Judge (dissenting):

Being unable to agree with the opinion of Acting Associate Justice Smith and dissenting therefrom, I adopt as my dissenting opinion the opinion prepared by Mr. Justice Cothran, when this cause was first heard in the Supreme Court. His opinion will be reported and is as follows:

"This action commenced on April 6, 1929 was brought to recover damages in the sum of $25,000.00 for personal in-

juries alleged to have been sustained by the plaintiff as a result of a collision between a passenger train of the defendant railroad company, operated by its engineer and co-defendant William Smith between Charleston and Greenville, and an automobile at a public highway crossing of defendant railroad company's track between Manning, S. C., and Alcolu. At the time of such collision, the plaintiff was riding on the front seat of such automobile, which was being driven by her husband. The complaint charges negligence and wilfulness on the part of the defendants in the operation of such train in a number of particulars.

The answer, after denying the allegations of the complaint, sets up the affirmative defences of gross contributory negligence and of contributory wilfulness on the part of the plaintiff, and in addition alleges that Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, 1922, on which plaintiff relied in her complaint, were null and void as being a regulation of interstate commerce in violation of Article I, Section 8, Subdivision 3, of the Constitution of the United States, and as construed by the Supreme Court of South Carolina that it denied to the defendant railroad company the equal protection of the laws and deprived it of its property without due process of law, in violation of the provisions of the Constitution of the United States.

The case was tried before Judge M. L. Bonham and a jury at the October, 1929 term of the Court of Common Pleas for Clarendon County. At such trial, the defendant railroad company introduced evidence showing that the train involved in the collision was a regular passenger train, running between Charleston and Greenville and that it was regularly engaged, and on the day of the accident was actually engaged, in the transportation of interstate passengers and interstate mail. At the close of the case, the defendant moved for a directed verdict in its favor on the grounds in brief that the evidence was insufficient to establish either negligence or wilfulness on the part of such [fol. 215] defendant as the proximate cause of the alleged injury to plaintiff, that plaintiff's own gross contributory negligence was a proximate cause of her injuries and that the signaling statute was an unlawful attempt to regulate interstate commerce and violated the "due-process-of-law"

and "the equal-protection-of-the-law" clauses of the Federal Constitution. After argument, the presiding Judge overruled the motion for a directed verdict.

The defendant railroad company, by its requests to charge, repeated its attack on the constitutionality of the sections, and in addition asked for an interpretation of them and an application thereof to the present case. In its requests to charge, the defendant railroad further took the position that as the case involved a train engaged in interstate commerce and also involved the questions of due process of law and the equal protection of the law; that the rule declared by the Supreme Court of the United States in Baltimore & Ohio R. Co., v. Goodman, 275 U. S. 66, was applicable and should be given to the jury as the test of liability in this case. These requests were refused.

The jury rendered a verdict in favor of the plaintiff for $7,500. A motion for a new trial, based on the same grounds as the motion for a directed verdict, was duly made and was refused. Judgment in favor of the plaintiff was thereupon entered on the verdict, and from such judgment the present appeal is prosecuted.

The collision occurred at a point upon the railroad where it was crossed by a highway, at right angle, between Manning and Alcolu, some five miles apart; going north from Manning the railroad crosses Black River Swamp, near Manning, and then curves to the left into a perfectly straight track which extends to the crossing, which is about 1,200 yards from the curve emerging from the swamp, and about 500 yards beyond. The plaintiff and her husband, he driving and she sitting on his right upon the front seat, left Manning, in an automobile with curtains drawn, in the train, going north on Highway No. 26; this Highway also crosses the swamp on the west side of the railroad, and as it emerges from the swamp, parallels the railroad as far as Alcolu, and some sixty feet from the track; about 1,200 yards from the swamp, the highway intersects another highway, No. 4, which crosses the railroad at right angle, 60 feet from the intersection. On account of work being done on Highway No. 26 between Manning and Sumter the party had to detour on Highway No. 4 at its intersection with No. 26. As the driver turned from No. 26 into No. 4 he slowed down his car and testified that he looked through

the drawn custains toward Manning but saw no train and heard none; he drove upon the crossing and immediately was struck by the train going from Manning north. Between this highway crossing and the river swamp, there are no obstructions between the railroad track and highway No. 26, and any person driving on highway No. 26 and turning into highway No. 4 has a plain and unobstructed view of the track and of any trains thereon all the way to the curve after the track comes out of the river swamp, which is nearly a mile. These physical facts are established not only by the oral testimony in the case but also by the plat which was put in evidence.

Mr. Ford testified that he looked *as well as he could* down the track and saw no train; Mrs. Ford testified that "the curtains were up, being a rainy misty morning I did the best I could to look for trains. *It was hard to see.*"

We have this situation presented: An automobile, with the curtains drawn, is being driven in a pouring rain, along a highway parallel with a railroad and very near to it, which gave the driver notice of the railroad; the driver makes a short turn, 60 feet from the crossing, informed of the crossing by a sign post 10 feet high with cross-arms, and makes for the crossing without stopping or otherwise taking the slightest care for his safety; at any point from [fol. 216] the turn to the crossing a coming train on a perfectly straight track, could have been seen for nearly a mile; there was not an obstruction to his view at any point on the approach; it appears too plainly that if he had taken the slightest care he is obliged to have seen the train, the Court is not bound to accept his statement that he looked and did not see it or to consider it evidence, admittedly inadequate.

The case is governed by the rule laid down in the case of Cable Piano Company v. R. Co., 94 S. C., 143, upon the authority of which the defendant's motion for a directed verdict should have been granted upon the ground of gross negligence upon the part of the driver and of the plaintiff. This case has been frequently cited with approval and has not been overruled. There is a suggestion in the case of Whitehead v. R. Co., 153 S. C. 339, that it cannot be considered "a leading case" by reason of later decisions, but so far as we have discovered the criticism has gone no further.

The most important feature in the appeal is the constitutionality of sections 4903 and 4925, Vol. 3, Code 1922; it is attacked by the defendant upon the ground that it violates the due process and equal protection provisions of the Federal Constitution.

It can hardly be questioned that section 4903 is a valid exercise of the police power of the state and its constitutionality sustained. Taken in connection however with section 4925 and the decisions of this Court construing and applying them, the statutory provisions must be held to offend the clauses of the Federal Constitution invoked by the defendant.

For convenience these sections are reproduced:

Section 4903. "A bell of at least thirty pounds weight and a steam or air whistle shall be placed on each locomotive engine or interurban car, and such bell shall be rung or such whistle sounded by the engineer or fireman or motorman at a distance of at least five hundred yards from the place where the railroad crosses any public highway or street or traveled place, and be kept ringing or whistling until the engine or interurban car has crossed such highway or street or traveled place; and if such engine or car shall be at a standstill within less distance than one hundred rods of such crossing such bell shall be rung or such whistle sounded for at least thirty seconds before such engine or interurban cars shall be moved, and shall be kept ringing or sounding until such engine or interurban cars shall have crossed such public highway or street or traveled place: Provided, That a gong of not less than ten inches in diameter may be placed upon interurban cars in lieu of a bell as herein required and shall be sounded as herein provided."

Section 4925. "If a person is injured in his person or property by collision with the engines or any car or cars of a railroad corporation at a crossing, and to appears that the corporation neglected to give the signals required by this Chapter, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment, as provided in the preceding Section, unless it is shown that in addition to a mere want of ordinary care the person injured, or the person having charge of his person or property, was at the time of the collision guilty of gross or wilful negligence, or was

acting in violation of the law, and that such gross wilful negligence or unlawful act contributed to the injury."

[fol. 217] It is so firmly settled as to be axiomatic that the construction and interpretation of a state statute by the highest court of the state are to be considered just as much a part of it as if actually expressed in the text.

Knight- of Pythias v. Meyer, 265 U. S. 30.
Leffingwell v. Warren, 2 Black 599.
St. Louis, etc., Co. v. Kansas City, 241 U. S. 419.
Standard Oil Co. v. Graves, 249 U. S. 389
Thornton v. Duffy, 254 U. S. 361.
Ward v. Krinsky, 259 U. S. 503.
Bunch v. Cole, 263 U. S. 250.
Missouri ex re-. Hurwitz v. North, 271 U. S. 40.
Chicago, etc., R. Co. v. Risty, 276 U. S. 567.

And in the light of such construction and interpretation, the validity of such statute under the Federal Constitution must be determined.

Price v. Illinois, 238 U. S. 446.
Missouri, etc., R. Co. v. Nebraska, 164 U. S. 403.
W. W. Cargill Co. v. Minnesota, 180 U. S. 452.
Lindsley v. Natural, etc., Co., 220 U. S. 61.
Purity, etc., Co. v. Lynch, 226 U. S. 192.

The interpretation of the signaling statute give- by the decisions of this Court consists of the following propositions:

1. The failure to give the statutory signals is negligence per se;

Strother v. R. Co., 47 S. C. 375.
Callison v. R. Co., 106 S. C. 123.
Keel v. R. Co., 108 S. C. 390.
Timmons v. R. Co., 138 S. C. 82.

2. If it appears that the signals were not given and that an injury resulted from a collision between the train and a traveller on the highway at a crossing, it will be presumed that the failure to give the signals was the proximate cause of the collision and injury, and warrants a recovery by the plaintiff without further proof;

Strother v. R. Co., 47 S. C. 375.
Edwards v. R. Co., 63 S. C. 271.

Bishop v. R. Co., 63 S. C. 532.
Turbyfil v. R. Co., 83 S. C. 325.
Lee v. R. Co., 84 S. C. 125.
Lawson v. R. Co., 91 S. C. 201.
Peeples v. R. Co., 115 S. C. 115.
Miller v. R. Co., 140 S. C. 123.
McBride v. R. Co., 140 S. C. 260.
Brogdon v. R. Co., 141 S. C. 238.
Glenn v. R. Co., 145 S. C. 41.
Whitehead v. R. Co., 153 S. C. 339.

3. Under the circumstances detailed in subdivision 2, the failure "is sufficient to warrant a reasonable inference of recklessness, wilfulness or wantonness, and therefore to carry that issue to the jury", but it is not recklessness, wilfulness or wantonness per se;

[fol. 218] It is so firmly settled as to be axiomatic that the construction and interpretation of a state statute by the highest court of the state are to be considered just as much a part of it as if actually expressed in the text.

Knight of Pythias v. Meyer, 265 U. S. 30.
Leffingwell v. Warren, 2 Black 599.
St. Louis, etc. Co. v. Kansas City, 241 U. S. 419.
Standard Oil Co. v. Graves, 249 U. S. 389.
Thornton v. Duffy, 254 U. S. 361.
Ward v. Krinsky, 259 U. S. 503.
Bunch v. Cole, 263 U. S. 250.
Missouri ex re-. Hurwitz v. North, 271 U. S. 40.
Chicago, etc. R. Co. v. Risty, 276 U. S. 567.

And in the light of such construction and interpretation, the validity of such statute under the Federal Constitution must be determined.

Price v. Illinois, 238 U. S. 446.
Missouri, etc. R. Co. v. Nebraska, 164 U. S. 403.
W. W. Cargill Co. v. Minnesota, 180 U. S. 452.
Lindsley v. Natural, etc. Co., 220 U. S. 61.
Purity etc. Co. v. Lynch, 226 U. S. 192.

The interpretation of the signaling statute given by the decisions of this Court consists of the following propositions:

1. The failure to give the statutory signals is negligence per se;

Strother v. R. Co., 47 S. C. 375.
Callison v. R. Co., 106 S. C. 123.
Keel v. R. Co., 108 S. C. 390.
Timmons v. R. Co., 138 S. C. 82.

2. If it appears that the signals were not given and that an injury resulted from a collision between the train and a traveller on the highway at a crossing, it will be presumed that the failure to give the signals was the proximate cause of the collision and injury, and warrants a recovery by the plaintiff without further proof;

Strother v. R. Co., 47 S. C. 375.
Edwards v. R. Co., 63 S. C. 271.
Bishop v. R. Co., 63 S. C. 532.
Turbyfil v. R. Co., 83 S. C. 325.
Lee v. R. Co., 84 S. C. 125.
Lawson v. R. Co., 91 S. C. 201.
Peeples v. R. Co., 115 S. C. 115.
Miller v. R. Co., 140 S. C. 123.
McBride v. R. Co., 140 S. C. 260.
Brogdon v. R. Co., 141 S. C. 238.
Glenn v. R. Co., 145 S. C. 41.
Whitehead v. R. Co., 153 S. C. 339.

3. Under the circumstances detailed in subdivision 2, the failure "is sufficient to warrant a reasonable inference of recklessness, wilfulness or wantonness, and therefore to carry that issue to the jury," but it is not recklessness, wilfulness or wantonness per se;

[fol. 219] Goodwin v. R. Co., 82 S. C. 327.
Rowe v. R. Co., 85 S. C. 25.
Callison v. R. Co., 106 S. C. 123.
Keel v. R. Co., 108 S. C. 390.
Miller v. R. Co., 140 S. C. 123.
Key v. R. Co., 144 S. C. 164.

4. The only defence available to the railroad company, aside from a denial of liability, is that the *the* plaintiff at the time of the accident was acting in violation of law or was acting with a "conscious disregard of consequences" amounting to wilfulness;

Glenn v. R. Co., 145 S. C. 41.

5. The doctrine of the Supreme Court of the United States in the case of B. & O. R. Co. v. Goodman, 275 U. S. 65, is denied in South Carolina;

Key v. R. Co., 150 S. C. 29.
Holladay v. R. Co., 150 S. C. 243.

6. Altho' holding that the failure to give the signals is only a prima facie presumption rebuttable by evidence, the Court holds that the presumption does not vanish on the introduction of opposing evidence, but throughout the entire case it is given the effect of evidence to be weighed against opposing evidence of the defendant.

Baker v. Tel. Co., 57 S. C. 174.
McLeod v. R. Co., 95 S. C. 71.
Glenn v. R. Co., 96 S. C. 357.
Matthews v. R. Co., 98 S. C. 204.
Ervin v. R. Co., 106 S. C. 354.
Perryman v. R. Co., 105 S. C. 34.
Thompson v. R. Co., 113 S. C. 261.
McBride v. R. Co., 140 S. C. 260.

The oft-repeated declaration that the failure of a railroad company to comply with the requirements of the signaling statute, is negligence per se, is an unfortunate and misleading expression of the law; it is a confusion of the colloquial interpretation of negligence with the legal, and is the source of the error which appears in the McBride case, that the failure referred to creates a presumption that it was the proximate cause of a collision. The colloquial interpretation of the term is synonymous with breach of duty; the legal is an actionable wrong. It would be more accurate to say that it is a breach of duty; it cannot be negligence in the legal sense unless the breach of duty is shown to have caused injury.

Judge Cooley in his work on Torts (3rd Ed.) page 1324 defines negligence "as the failure to observe for the protection of the interests of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury."

In 45 C. J. 632, it is said:

"In every case involving negligence there are necessarily three elements essential to its existence: (1) The existence of a duty on the part of defendant to protect plaintiff from

the injury; (2) Failure of defendant to perform their duty; and (3) Injury to plaintiff from such failure of the defendant. When these elements are brought together they unitedly constitute actionable negligence, and the absence of any one of these elements renders the complaint bad or the evidence insufficient."

[fol. 220] To say that the failure constitutes negligence per se is therefore erroneous in that it presumes, even prima facie, the three elements of actionable negligence above referred to, which cannot be the law.

The decisions of this Court have injected into the statute a still more objectionable feature: that evidence of the failure to comply with the statute carries a presumption that such failure was the proximate cause of the collision and injury. The writer of this opinion has expressed his views fully upon this subject in a dissenting opinion in the McBride case, 140 S. C. 260, and will not add anything to what is there written except to repeat a quotation from one of our own cases, which crystalizes the law upon the subject:

"When evidence of negligence is only prima facie, it is subject to rebuttal, but when there is negligence per se, it is conclusive of that question. The fact that there is negligence per se, does not, however, tend to show, that such negligence is actionable. The question whether negligence is actionable, depends upon the further question, whether such negligence was the direct and proximate cause of the injury."

Whaley v. Ostendorff, 90 S. C. 281.

Under the doctrine declared by the South Carolina decisions, upon the trial of a crossing case, the issue is not, as in all other tort cases, whether the failure to give signals was the proximate cause of the collision; that issue is settled by the presumption, the sole issue is whether the signals were given. If a single witness should testify that he was in a position to hear and did not hear the signals, the case must be submitted to a jury and the presumption in the absence of opposing evidence will be sufficient to sustain a verdict against the railroad company based upon both negligence and wilfulness. The extent to which this presumption is carried appears in the case of Lawson v. R. Co., 91 S. C. 201, where the Court said:

"Where an act is negligence *per se* the jury *must find negligence.* Where it is a mere evidence of negligence, the jury may not find that the defendant was negligent. The failure to sound the bell or whistle has been declared by this Court to be negligence, and if the jury had believed from the evidence that neither the bell was rung nor the whistle sounded, then *they were bound to find for plaintiff.*"

In fairness to the trial Judge it should be stated that he did not charge that the presumption was conclusive; he charged the jury in line with the declaration of the Court in the McBride case: "It must be borne in mind that this presumption does not mean that the causal relationship, (connection?) between the failure to give the signals and the injury is shown conclusively. The presumption merely establishes a prima facie case, which may be overcome by testimony whether given for the plaintiff or for the defendant"; and in the same connection charged that the presumption arising from the failure to give the signals may be considered with any and all other evidence in the case.

That this declaration is erroneous, as violative of the constitutional provisons, is demonstrated by the rulings of the Supreme Court of the United States in the case of Western & Atlantic R. Co. v. Henderson, 279 U. S. 639, decided May 27, 1929.

In the Henderson case the plaintiff's intestate was killed in a collision at a railroad grade crossing, between a truck he was driving and a train of the railroad company. Plaintiff recovered under a statute of Georgia which declared, that on proof of the happening of such an accident, a pre-[fol. 221] sumption arose that it was due to the negligence of the railroad company as a proximate cause.

Assuming that the Court, following its own decision in the case of Mobile etc. R. Co. v. Turnipseed, 219 U. S., 35, would have sustained the Georgia statute in the Henderson case, if the statute, either by its terms or by a construction of it by the Georgia Court, had provided for simply a prima facie presumption of negligence, it seems clear that the trial Judge in the case at bar, and the Court in the McBride case, misapprehended the office of a prima facie presumption, in according to it the effect of evidence to be weighed against opposing evidence. (See quotation above.)

In the Turnipseed case the plaintiff relied upon a Mississippi statute which provided:

"Proof of injury inflicted by the running of the locomotives or cars of such (railroad) company, shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury."

The Supreme Court refused to sustain an attack upon the statute as arbitrary and in violation of the due process clause of the Constitution, saying:

"The only legal effect of this inference is to cast upon the railroad company the duty of producing some evidence to the contrary. When that is done, the inference is at an end and the question of negligence is one for the jury upon all of the evidence. * * * The statute does not * * * fail in due process of law, because it creates a presumption of liability, since its operation is only to supply an inference of liability in the absence of other evidence contradicting such inference."

Differentiating the Turnipseed case the Court in the Henderson case said:

"That case is essentially different from this one. Each of the state enactments raises a presumption from the fact of injury caused by the running of locomotives or cars. The Mississippi statute created merely a temporary inference of fact that vanished upon the introduction of opposing evidence. Gulf, M. & N. R. Co. v. Brown, 138 Miss. 39, 66, et seq. Columbus & G. Ry. Co. v. Fondren, 145 Miss. 679. That of Georgia as construed in this case creates an inference that is given effect of evidence to be weighed against opposing testimony and is to prevail unless such testimony is found by the jury to preponderate."

The Court further said:

"Upon the mere fact of collision and resulting death, the statute is held to raise a presumption that defendant and its employees were negligent in each of the particulars alleged, and that every act or omission in plaintiff's specifications of negligence was the proximate cause of the death; and it makes defendant liable unless it showed due care in respect of every matter alleged against it. And, by authorizing the jury, in the absence of evidence, to find negligence,

in the operation of the engine and train, the Court necessarily permitted the presumption to be considered and weighed as evidence against the testimony of defendant's witnesses tending affirmatively to prove such operation was not negligent in any respect.

"Appellee insists that paragraph 2780 is valid, and argues that the presumption, *being one established by statute, has the effect of evidence* and that it is for the jury to decide whether the company's evidence is sufficient to over-[fol. 222] come the presumption; that 'it should not as a matter of law be dissipated the instant any testimony it taken against it;' and that the issue is to be determined on a consideration of all the evidence including the presumption.

"Legislation declaring that proof of one fact or group of facts shall constitute *prima facie* evidence of an ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred. A *prima facie* presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. *A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it, violates the due process clause of the* 14*th Amendment. Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property.*"

And then it reached this conclusion:

"The *presumption* raised by par. 2780 is *unreasonable* and *arbitrary* and violates the due process clause of the 14th Amendment. Manley v. Georgia, supra; McFarland v. American Sugar Co. 241 U. S. 79, 60 L. Ed. 899, 36 Supt. Ct. Rep. 498; Bailey v. Alabama, 219 U. S. 219, 55 L. Ed. 191, 31 Sup. Ct. Rep. 145."

The point under discussion is clearly elaborated in the case of Kirch v. A. C. L. R. Co. (C. C. A.) 38 Fed. 2d 963. That case involved a construction of a Florida statute which was a copy of the Georgia statute construed in the Henderson case. The statute was upheld against an attack upon its constitutionality, the railroad company contending that the decision should be ruled by the Henderson case. The Court pointed out the distinction between the two cases thus:

"There is no doubt that the Florida statute was copied from the Georgia statute; but the Florida Supreme Court has given to it a construction that is different from the construction which the Supreme Court held in the Henderson case has been given by the Supreme Court of Georgia. In the just cited case it was said that the statute as construed by the Georgia decisions 'creates an inference that is given effect of evidence to be weighed against opposing testimony, and is to prevail unless such testimony is found by the jury to preponderate.' The uniform construction of the statute by the Supreme Court of Florida is that it merely creates a presumption that disappears and comes to an end upon the submission of proof by a railroad company that its agents have exercised ordinary and reasonable care."

In the McBride case, this Court declared that collision and injury at a crossing is "the natural and probable consequence of the failure to give the signals." The Supreme Court of the United States declared otherwise in the Henderson case, using this language:

"The mere fact of collision between a railway train and a vehicle at a highway grade crossing *furnishes no basis* for any inference as to whether the accident was caused by negligence of the railway company or of the traveler on the highway or both or without fault of anyone. *Reasoning does not lead from the occurernce back to its cause.*"

A statute, complemented by the decisions of this Court, [fol. 223] that makes it possible to say as a matter of law, what was the proximate cause of an accident can not be due process of law. Such a statute in effect declares that the presumption created thereby is not rebuttable. True, the railroad in such a suit is accorded the privilege of offering evidence, but of what possible avail is this when the jury is at liberty to render a verdict against it on the vital element of proximate cause without a vestige of testimony as to proximate cause? Manifestly, when the overcoming of the presumption as to proximate cause thus rests solely on the whim and caprice of the jury, it is but a mockery to say the defendant railroad is afforded the opportunity to rebut such presumption. Such a right of rebuttal may be given in form, but it is effectually denied in substance. The so-called right of rebuttal "keeps the promise to our ear, and breaks

it to our hope." A fair opportunity to repel the presumption being denied, due process of law is not afforded.

The plaintiff here has not made out such a case as should entitle her to recover either in law or in morals. Take away the incredible testimony of her and her husband that they did not hear any signals, and the arbitrary presumption applied to the finding of the jury thereon, and her case would collapse. A recovery by the plaintiff under the facts of this case solely by virtue of this presumption, proves convincingly the fact that it is arbitrary and unreasonable.

Prior to the decision in the McBride case, the Circuit Courts could direct verdicts in crossing cases, and they would be sustained. But since that case and those that have followed it, no Circuit Judge can now say as a matter of law either that this arbitrary presumption has been overcome, or that the plaintiff was responsible for the accident. Under the present state of the decisions, the jury and the jury alone can say whether this presumption has been rebutted, and the jury can render a verdict on the presumption alone without a scintilla of evidence to support it. This is exactly what was condemned in the Henderson case.

The statute is unconstitutional for another reason: It makes an unreasonable discrimination against railroad corporations in the matter of the contributory negligence of the injured person as a defence to the action for damages; it requires the railroad corporation to show that the injured person, "in addition to a mere want of ordinary care", was guilty of gross or wilful negligence or a violation of the law; a condition applicable to no other class of tort-feasors under the sun; it has no earthly connection with the police regulation contained in section 4903; it contributes nothing in aid of the enforcement of that section, and was evidently adopted for the purpose of making a railroad corporation an insurer of the safety of every traveller regardless of his conduct. In the case of Glenn v. R. Co. 145 S. C. 41, the Court goes even beyond the construction theretofore adopted in holding that the gross negligence referred to in the statute is the equivalent of intentional conduct on the part of the traveller, practically a suicide. It is there said:

"The term 'gross negligence' does not stand by itself in the statute but the context characterizes the meaning and

gives it the significance of wilfulness." In other words, the railroad company is not excused if the traveller be shown to have been guilty of a mere want of ordinary care; nor if he be shown to have been guilty of gross negligence, altho' the statute so declares; he must be shown to have been guilty of wilfulness, and intentional disregard of all care.

The Court was in error in not applying the doctrine declared in the case of B. & O. R. Co. v. Goodman, 275 U. S. 66.

[fol. 224] That case declares, quoting syllabus:

"One who drives upon a railroad track relying upon not having heard a train or any signal and taking no further precaution, does so at his own risk. If he cannot otherwise be sure whether a train is dangerously near, the driver must stop and get out of his vehicle before attempting to cross."

The Court said:

"It is true * * * that the question of due care very generally is left to the jury. But where dealing with a standard of conduct, and when the standard is clear it should be laid down once for all by the courts."

This standard, which is based on the fundamental conception of the mutual rights and the mutual obligations of the respective parties as judged by the circumstances of the situation, has been rejected by this Court on the ground that it conflicts with sections 4903 and 4925, and that they furnish the sole standard of conduct in this State; it is expressly so ruled in the cases of Key v. R. Co. 150 SC. 29, and Holladay v. R. Co. 150 SC. 243, hereinbefore cited. No Federal question was involved in either of those cases, but the Court recognized the principle that where a Federal question was involved the rulings of the Federal Supreme Court must be respected and are controlling. The vital issue is whether the rule announced in the Goodman case was intended by the Supreme Court as a declaration of the rights and obligations of the respective parties touching the operation of an interstate train at grade crossings. It certainly defines with particularity the duty of the

traveller approaching it, in reference to precautions which he must take; precautions intended not only for his protection but for the protection of the property of the railroad company and the employees and passengers who may be upon the train the conduct of the traveller necessarily affects the conduct of the train employees who have the right to act upon the assumption that the traveller will respond to his obligations. Besides, it directly affects the conduct of the train employees as is demonstrated by the following extract:

"When a man goes upon a railroad track, he knows that he goes to a place where he will be *be* killed if a train comes upon him before he is clear of the track. *He knows that he must stop for the train, not the train for him.*"

There is no question but that the train at this time was an instrumentality of interstate commerce and that the engineer was engaged in such commerce.

The fact that a state regulation will to some extent affect interstate commerce does not necessarily invalidate such regulation. The rule is thus declared in Atlantic Coast Line v. Georgia, 234 U. S. 280:

"In thus deciding the Court applied the settled principle that in the absence of legislation by Congress, the States are not denied the exercise of their power to secure safety in the physical operation of railroad trains within their territory, even though such trains are used in interstate commerce. * * * It was not intended that pending Federal actions the use of such agencies, which unless carefully guarded was fraught with danger to the community, should go unregulated and that the States should be without authority to secure needed local protection. *The requirements of a State of course must not be arbitrary or pass beyond the limits of a fair judgment as to what the exigency demands,* * * *."

The Court quotes from Smith v. Alabama, 124 U. S. 465, as follows:

[fol. 225] "The rules prescribed for their construction and for their management and operation, designed to protect persons and property, otherwise endangered by their

use, are strictly within the limits of the local law. They are not per se regulations of commerce; it is only when they operate as such in the circumstances of their application, and conflict with the expressed or presumed will of Congress exerted on the same subject, that they can be required to give way to the supreme ruling of the Constitution." Citing cases.

See also Nashville R. Co. v. White, 278 U. S. 456; Truax v. Corrigan, 257 U. S. 312.

From this it is fair to conclude that section 4903, which prescribes the signals to be given by a railroad corporation as its train approaches a highway crossing, is a police regulation, within the legislative power of a state, notwithstanding its direct effect upon trains employed in interstate commerce. The vice is not in that section, but in section 4925 and the decisions of this Court interpreting it, in antithesis to the rule declared in the Goodman case.

While the classification of railroads for many purposes is justified, it is invariably held that the regulation must be based upon rational grounds.

In R. Co. v. Ellis, 165 U. S. 150, it was held, quoting syllabus:

"The mere fact of classifications is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and in all cases it must appear not merely that a classification has been made, but also that it is based upon some reasonable ground—something which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection."

We think that section 4925, taken in connection, as we must do, with the interpretation of its sanctioned by this Court, above referred to, has no reasonable connection with the police regulation of section 4903; it is divorced entirely from the regulations of that section, and appears to have been intended to make it easy for the injured party to recover damages and difficult for the railroad company to defend the suit. It cannot be successfully contended that the effect of the statute, section 4925, was simply to change a rule of evidence. In Easterling v. Pierce, 235 U. S. 381, it was held that a state statute which cuts off no substantive defense, but simply provides a rule of evidence con-

trolling the burden of proof does not deny due process of law. According to this rule it is conceded that so far as section 4903 created a prima facie presumption that section is constitutional; but the evident purpose and manifest effect of section 4925 is to cut off the very substantive defense under the common law rule of contributory negligence which would otherwise avail the defendant.

For another reason the statute, as interpreted, is an interference with interstate commerce:

Under it the traveller is not to be held guilty of contributory negligence unless the defendant company makes it appear that in addition to the mere want of ordinary care he has been guilty of gross or wilful negligence or a violation of law; to make it appear that he was guilty of gross negligence, the railroad company must show that he did not exercise even slight care, for gross negligence is the absence of that degree of care; hence the traveller is excused by the exercise of slight care; in other words that is all that he is required to do.

[fol. 226] In this day of heavy automobiles and incorporated passenger buses and freight truck lines, some of them with trailers transporting 80 bales of cotton, 40,000 pounds, is the danger of damage to the interstate train by a collision with them, so negligible as to require of the driver only slight care to avoid it? Are the rights of the engineer and trainmen protected by so lax a requirement? Has the passenger upon a through train, interstate commerce, no right to demand even ordinary care on the part of the traveller to avoid a collision? Within the last year, upon a western railroad, a passenger train collided with a loaded freight truck at a crossing; the engine and passenger coaches were derailed and thirty passengers killed or injured. Did the truck driver comply with the law or with the dictates of humanity by exercising slight care? That may have been the rule in the days of horse-drawn vehicles, but not now.

By its unjust, unfair and unreasonable discriminations against railroads in favor of travellers on the highway in every particular herein discussed, this statute denies to railroads the equal protection of the laws and by such denial takes the property of the railroads without due process of law and turns it over to plaintiffs alleging injury in crossing accidents. Unless these two protecting clauses of the

Fourteenth Amendment have become "a mere rope of sand, in no manner restraining state action" (Gulf, etc. R. Co. v. Ellis, supra), they compel the conclusion that this statute transcends the power of the state, and must therefore be declared void.

The charge upon gross negligence was clearly erroneous:

"Now gross negligence is the failure to exercise slight care; the failure to exercise slight care. As distinguished from ordinary negligence, simple negligence, it is the intentional, conscious failure to do a thing that is incumbent upon one to do, or the doing of a thing intentionally that one ought not to do."

Gross negligence, as his honor charged, is the absence of slight care. It is a species of negligence which means inadvertence, the antipode of an intentional act.

The judgment of this Court should be that the judgment of the Circuit Court be reversed and the case remanded for a new trial."

IN SUPREME COURT OF SOUTH CAROLINA

CONCURRING OPINION

S. W. G. SHIPP, Circuit Judge (concurring):

I concur in the opinion prepared in this case by His Honor Associate Justice Thomas P. Cothran, which has been adopted by His Honor Judge William H. Grimball as his opinion in this case, and especially on the ground that the statute under review discriminates against the railroad company in favor of the engineer in preserving to the engineer, through whom the railroad company acts, all the defenses allowed by the common law while denying the railroad company such defenses. This is clearly an unreasonable discrimination, and in my opinion is a direct violation of the Fourteenth Amendment of the Constitution of the United States.

[fol. 227] IN SUPREME COURT OF SOUTH CAROLINA

[Title omitted]

PETITION FOR APPEAL

To Honorable Eugene S. Blease, Chief Justice of the Supreme Court of the State of South Carolina:

Your petitioners, Atlantic Coast Line Railroad Company and William Smith, feeling themselves aggrieved by the final judgment and decision made by the Supreme Court of South Carolina in en banc session in the above entitled case and filed May 11, 1932, sustaining the judgment of the lower court and holding that Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, 1922, as construed by the Supreme Court of South Carolina, are not in conflict with the due process of law and the equal protection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States, and do not constitute a burden upon and regulation of interstate commerce in violation of Article I, Section 8, subdivision 3, of the Constitution of the United States, pray that an appeal from said final judg-
[fol. 228] ment and decision may be allowed to the Supreme Court of the United States, and in connection with this petition, they present herewith their assignment of errors.

Atlantic Coast Line Railroad Company and William Smith, by Thomas W. Davis, Henry E. Davis, Attorneys.

[fol. 229] IN SUPREME COURT OF SOUTH CAROLINA

[Title omitted]

ORDER ALLOWING APPEAL

Upon consideration of the petition of Atlantic Coast Line Railroad Company and William Smith, defendants in the above entitled case, and on motion of Henry E. Davis, Esq., attorney for such petitioners, it is

Ordered that an appeal to the Supreme Court of the United States from the final decision and judgment heretofore filed and entered herein be, and the same is hereby, allowed, and that a certified transcript of the record, testi-

mony, exhibits, opinions, and all proceedings in the cause be forthwith transmitted to said Supreme Court of the United States under the hand and seal of the Clerk of this Court. It is further

Ordered that the bond on appeal be fixed at the sum of Ten Thousand ($10,000.00) Dollars, the same to act as a supersedeas bond, conditioned for the payment of costs and damages as required by law.

Eugene S. Blease, Chief Justice of the Supreme Court of South Carolina.

June 13, 1932.

[fol. 230] In Supreme Court of South Carolina

[Title omitted]

Assignment of Errors

Now come the defendants Atlantic Coast Line Railroad Company and William Smith, appellants herein, and in connection with their appeal, make the following assignment of errors:

1. The Supreme Court of South Carolina in en banc session erred in holding that Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, 1922, as construed by the Supreme Court of South Carolina, do not deprive the defendant railroad company of its property without due process of law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of South Carolina in en banc session erred in holding that Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, 1922, as construed by the Supreme Court of South Carolina, do not deny to the defendant railroad company the equal protection of the laws in violation of the provisions of the Four-
[fol. 231] teenth Amendment to the Constitution of the United States.

3. The Supreme Court of South Carolina in en banc session erred in holding that Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, 1922, as

construed by the Supreme Court of South Carolina, do not constitute burdens upon and regulations of interstate commerce in violation of Article I, Section 8, subdivision 3, of the Constitution of the United States.

Wherefore the said Atlantic Coast Line Railroad Company and William Smith, appellants herein, pray that the judgment of the Supreme Court of South Carolina in en banc session be reversed, and that further be done herein as of right and according to the laws and customs of the United States should be done.

Thomas W. Davis, Henry E. Davis, Attorneys for Atlantic Coast Line Railroad Company and William Smith, Appellants.

[fols. 232 & 233] Citation, in usual form, showing service on W. C. Davis, omitted in printing.

[fols. 234 & 235] Bond on appeal for $10,000, approved June 13, 1932, omitted in printing.

[fol. 236] In Supreme Court of South Carolina

[Title omitted]

Præcipe for Transcript of Record

To J. B. Westbrook, Esq., Clerk of the Supreme Court of South Carolina:

The appellants hereby request that the following portions of the record of this case in the Supreme Court of South Carolina be incorporated into the transcript of the record on the appeal to the Supreme Court of the United States, to-wit:

1. Copy of the entire printed Transcript of Record of the case in the Supreme Court of South Carolina.

2. Copies of all the Opinions of the Supreme Court of South Carolina in en banc session, filed in the case.

3. Copy of Petition for Appeal.
4. Copy of Order allowing appeal.
5. Original Citation, with acceptance of service endorsed thereon.
6. Copy of Supersedeas Bond.
7. Copy of this Præcipe, with copy of proof or acknowl-
[fol. 237] edgment of service thereof.
8. Copy of Stipulation of counsel as to portions of the record to be included in transcript.
9. Original Assignment of Errors.

Thos. W. Davis, Henry E. Davis, Attorneys for Appellants.

Endorsed

"I hereby acknowledge due and legal service on me and receipt of copy of the within Præcipe at Manning, S. C. this June 20, 1932.

W. C. Davis, of Counsel for Katherine H. Ford, Appellee."

[fol. 238] In Supreme Court of South Carolina

[Title omitted]

Stipulation as to Transcript of Record

The undersigned attorneys for Atlantic Coast Line Railroad Company and William Smith, appellants, and Katherine H. Ford, appellee, do hereby stipulate that the following portions of the record shall be included by the Clerk of the Supreme Court of South Carolina in the transcript of record for appeal of the case to the Supreme Court of the United States, to-wit:

1. Copy of the entire printed Transcript of Record of the case in the Supreme Court of South Carolina.
2. Copies of all the Opinions of the Supreme Court of South Carolina in en banc session, filed in the case.
3. Copy of Petition for Appeal.
4. Copy of Order allowing appeal.
5. Original Citation, with acceptance of service endorsed thereon.
6. Copy of Supersedeas Bond.

7. Copy of Præcipe, with copy of proof or acknowledgment of service thereof.

8. Original Assignment of Errors.

[fol. 239] 9. Copy of this Stipulation of counsel as to portions of the record to be included in transcript.

Thos. W. Davis, Henry E. Davis, Attorneys for Appellants. W. C. Davis, J. W. Wideman, Attorneys for Appellee.

[fol. 240] In Supreme Court of South Carolina

[Title omitted]

Clerk's Certificate.

I, J. B. Westbrook, Clerk of the Supreme Court of the State of South Carolina, pursuant to the appeal to the Supreme Court of the United States allowed in the above entitled case on June 13, 1932, hereby transmit under my hand and seal the following as the record on which the case shall be heard in the Supreme Court of the United States, in accordance with the stipulation of attorneys for the appellants and the appellee, to-wit:

1. Copy of the entire printed Transcript of Record of the case in the Supreme Court of South Carolina.

2. Copies of all the Opinions of the Supreme Court of South Carolina in en banc session, filed in the case.

3. Copy of Petition for Appeal.

4. Copy of Order allowing appeal.

5. Original Assignment of Errors.

6. Original Citation, with acceptance of service endorsed thereon.

7. Copy of Supersedeas Bond.

8. Copy of Præcipe, with copy of proof or acknowledgment of service thereof.

[fol. 241] 9. Copy of Stipulation of counsel as to portions of the record to be included in transcript.

I further certify that all the copies of the record so transmitted are true and correct, and that the record consisting of 239 numbered pages, is complete, containing in itself and not by reference all the papers in accordance with said stipulation necessary to the hearing of said case in the Supreme Court of the United States.

And I do further certify that under the practice in the Supreme Court of South Carolina, no formal judgment is entered and that the prevailing opinion of the Court is of itself the final judgment of such Court.

Witness my hand and the seal of the Supreme Court of South Carolina this 29th day of June, 1932.

J. B. Westbrook, Clerk of the Supreme Court of South Carolina. (Seal Supreme Court of South Carolina.)

[fol. 242] IN SUPREME COURT OF UNITED STATES OF AMERICA

STATEMENT OF THE POINTS ON WHICH APPELLANTS INTEND TO RELY, AND STIPULATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed July 13, 1932

The appellants, Atlantic Coast Line Railroad Company and William Smith, intend to rely on each and all of the points raised by the three assignments of error, to-wit:

1. Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, 1922, as construed by the Supreme Court of South Carolina, deprive them of their property without due process of law, in violation of the Fourteenth Amendment to the Federal Constitution.

2. Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, 1922, as construed by the Supreme Court of South Carolina, deny to them the equal protection of the laws, in violation of the Fourteenth Amendment to the Federal Constitution.

[fol. 243] 3. Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, 1922, as construed by the Supreme Court of South Carolina, are an unlawful regulation of, and a burden upon, interstate commerce, in violation of the Federal Constitution.

The following portions of the record are necessary for a consideration of the points so made and on which appellants intend to rely:

1. Printed Transcript of Record of the case in the Supreme Court of South Carolina, leaving out the reference

to exhibits on page 138 thereof, as such exhibits have no application to the points made by this appeal.

2. All opinions of the Supreme Court of South Carolina in en banc session filed in the case.

3. Assignment of Errors.

4. Citation, with acceptance of service endorsed thereon.

5. Proper reference as to Petition for Appeal, Order allowing appeal, Supersedeas Bond, Præcipe, and Stipulation of counsel as to portions of record to be included in the transcript.

6. State Supreme Court Clerk's Certificate with Record.

Thomas W. Davis, Henry E. Davis, Attorneys for Appellants.

We hereby acknowledge service on us, and receipt of copy, of the foregoing Statement, at Manning, S. C., this 8 day of July, 1932.

W. C. Davis, J. W. Wideman, Attorneys for Appellee.

[fols. 244 & 245] STIPULATION

We hereby stipulate that the foregoing statement as to the points to be relied on on the appeal and the portions of the record to be printed for the consideration thereof, is sufficient and acceptable to us, and that such portions of the record shall be printed as the record on which the hearing shall be had on the appeal in the Supreme Court of the United States.

Thomas W. Davis, Henry E. Davis, Attorneys for Appellants. W. C. Davis, J. W. Wideman, Attorneys for Appellee.

[fol. 246] [File endorsement omitted.]

Endorsed on cover: File No. 36,891. South Carolina Supreme Court. Term No. 194. Atlantic Coast Line Railroad Company and William Smith, appellants, vs. Katherine H. Ford. Filed July 5, 1932. File No. 36,891.

FILE COPY

Office Supreme Court, U. S.
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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932

No. 194

ATLANTIC COAST LINE RAILROAD COMPANY
AND WILLIAM SMITH, APPELLANTS,

vs.

KATHERINE H. FORD.

STATEMENT AS TO JURISDICTION.

THOMAS W. DAVIS,
HENRY E. DAVIS,
Counsel for Appellants.

(36,891)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932

No. 194

ATLANTIC COAST LINE RAILROAD COMPANY AND WILLIAM SMITH, APPELLANTS,

vs.

KATHERINE H. FORD, APPELLEE.

STATEMENT AS TO JURISDICTION ON APPEAL.

MAY IT PLEASE THE COURT:

The appellants, in support of the jurisdiction of this Court to review the above entitled case on appeal, respectfully show:

A.

Statutory Provisions Sustaining Jurisdiction.

The jurisdiction of the Supreme Court of the United States on appeal is invoked by appellants under Section 237 of the Judicial Code (28 U. S. C. A., Section 344), as amended by the Act of February 13, 1925 (c. 229,

Sec. 1, 43 Stat., 937), and as further amended by the Act of January 31, 1928 (28 U. S. C. A., Sections 861*a*, 861*b*; c. 14, Secs. 1 and 2, 45 Stat., 54), and by the Act of April 26, 1928 (28 U. S. C. A., Section 861*b*; c. 440, 45 Stat., 466). The pertinent provisions of Section 237 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Section 344), are these:

> "* * * A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. * * *"

The two amendatory acts of 1928 mentioned above substituted an "appeal" for the "writ of error" specified in the amended Section 237 of the Judicial Code, so that Section 237 by reason thereof should now read "appeal" where it formerly read "writ of error."

B.

Date of the Judgment Sought to be Reviewed and Date on which the Application for Appeal was Presented.

The final judgment of the Supreme Court of South Carolina sought to be reviewed was rendered on May 11, 1932 (R. 181).

(References are to the printed record in the Supreme Court of the State and the unprinted *addenda*

thereto, the record not yet having been printed in this Court.)

The application for appeal was presented and allowed on June 13, 1932 (R. 225-227), within three months, as required by the Act of February 13, 1925 (28 U. S. C. A., Sec. 350; c. 229, Sec. 8, 43 Stat., 940). This appeal was allowed by the Chief Justice of the Supreme Court of South Carolina, and the citation was signed by him on June 13, 1932 (R. 227-231), in accordance with the provisions of the Act of March 3, 1911 (28 U. S. C. A., 868).

C.

Nature of the Case and Rulings thereon in the Court Below.

This is a suit instituted in the Court of Common Pleas in the State of South Carolina for personal injuries alleged to have been sustained by the appellee Katherine H. Ford as the result of a collision between an automobile in which she was riding and a railroad train of the appellant railroad company, operated by the appellant William Smith as engineer, at a highway grade crossing near Manning, South Carolina. At the time of such collision, the appellee was riding on the front seat of such automobile which was being driven by her husband, George C. Ford (R. 1). The complaint charged negligence and wilfulness on the part of the appellants in the operation of such train in a number of particulars, which are specifically set out therein (R. 2-5). As appeared from its allegations,

the complaint stated a cause of action under Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina for the year 1922 (R. 2-5).

The answer, after denying the allegations of the complaint, set up the affirmative defenses of gross contributory negligence and of contributory wilfulness on the part of the appellee, and in addition alleged that Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, 1922, on which the appellee specifically relied in her complaint, were null and void as being a regulation of interstate commerce in violation of Article I, Section 8, Subdivision 3, of the Constitution of the United States, and further that said Sections 4903 and 4925 as construed by the Supreme Court of South Carolina denied to the appellants the equal protection of the laws and deprived them of their property without due process of law, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States (R. 6, 7).

The sections so attacked by the answer are as follows:

> "(4903) Signals to Be Given at Crossings.—A bell of at least thirty pounds weight and a steam or air whistle shall be placed on each locomotive engine or interurban car, and such bell shall be rung or such whistle sounded by the engineer or fireman or motorman at the distance of at least five hundred yards from the place or street or traveled place, and be kept ringing or whistling until the engine or interurban car has crossed such highway or street or traveled place; and if such engine or car shall be at a

standstill within less distance than one hundred rods of such crossing such bell shall be rung or such whistle sounded for at least thirty seconds before such engine or interurban cars shall be moved, and shall be kept ringing or sounding until such engine or interurban cars shall have crossed such public highway or street or traveled place: *Provided,* That a gong of not less than ten inches in diameter may be placed upon interurban cars in lieu of a bell as herein required and shall be sounded as herein provided."

"(4925) *Injuries at Crossings—Penalty and Damages.*—If a person is injured in his person or property by collision with the engines or any car or cars of a railroad corporation at a crossing, and it appears that the corporation neglected to give the signals required by this Chapter, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment, as provided in the preceding Section, unless it is shown that in addition to a mere want of ordinary care the person injured, or the person having charge of his person or property, was at the time of the collision guilty of gross or wilful negligence, or was acting in violation of the law, and that such gross wilful negligence or unlawful act contributed to the injury."

At the close of the entire case, the defendants, who are appellants here, made a motion for a directed verdict in their favor (R. 138, 139). In this motion they attacked the constitutionality of Sections 4903 and 4925 above quoted on the following grounds:

1. That they deprive the defendants of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

2. That they deny to the defendants the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

3. That they constitute an unlawful burden upon and interference with interstate commerce, in violation of the provisions of Article I, Section 8, paragraph 3, of the Constitution of the United States (R. 138, 139).

After hearing full argument, the court refused to hold the sections unconstitutional and void as contended by the defendants in the trial court (R. 139-145). Thereupon, the defendants in the trial court renewed their attack on the constitutionality of the statutes in question by specific requests to charge (R. 145-148). Of these requests to charge, numbers 3 and 6 presented squarely the question of the constitutionality of the statutes in question under the commerce clause of the Constitution, while requests 4, 5, 7 and 8 likewise presented squarely the question of the constitutionality of these statutes under the Fourteenth Amendment to the Constitution. All of these requests were refused (R. 148).

Following the charge of the presiding judge in the trial court, the jury rendered a verdict in favor of the present appellee in the sum of $7,500.00 (R. 163). The defendants below thereupon submitted a motion

for a new trial upon the same grounds on which they had asked for a directed verdict, and thus presented to the court again the question of the constitutionality of these statutes (R. 163, 164). The trial court refused to set the verdict aside, and judgment was entered November 11, 1929, in favor of the appellee for $7,500.00 (R. 164).

From this judgment so entered in the trial court an appeal was then prosecuted to the Supreme Court of the State on a number of exceptions (R. 164-177). Of the exceptions so taken, numbers 2, 6, 9 and 12 raise the question of the constitutionality of these statutes under the commerce clause of the Federal Constitution, while numbers 3, 6, 7, 8, 11, 12 and 13 raise the question of the constitutionality of these statutes under the due process of law and the equal protection of the laws clauses of the Fourteenth Amendment to the Federal Constitution. So that it appears that the constitutionality of these statutes, both under the commerce clause of, and under the Fourteenth Amendment to, the Constitution of the United States, was attacked in the trial court by an affirmative plea in the answer, by a motion for a directed verdict, by requests to charge, and by a motion for a new trial, and that the attack was continued on the same grounds by proper exceptions in the Supreme Court of the State.

On the exceptions taken, the Justices of the Supreme Court were divided, and under the provisions of Article V, Section 12 of the State Constitution, the Circuit Judges were called in for assistance, thus con-

stituting the court *en banc*, as provided by that section. This Court, however, was but a session of the Supreme Court, as specifically held in the case of *Duncan* v. *Record Publishing Company*, 145 S. C. 196, 143 S. E. 31. The court so constituted passed on the constitutional questions presented by the exceptions of the appellants, and on May 11, 1932, filed final opinions in the cause (R. 181). The majority opinion overruled all of the exceptions of the appellants, and held that the statutes in question were not in any sense regulations of interstate commerce, did not deprive the appellants of their property without due process of law, and did not deny to them the equal protection of the laws, and therefore they were valid in all respects (R. 181-213). Mr. Justice Cothran of the Supreme Court had originally prepared a dissenting opinion holding the statutes in question to be unconstitutional and void for the reasons claimed by the appellants, but becoming incapacitated by reason of sickness, he was unable to sit with the Court *en banc*. His opinion, however, was adopted in full by Circuit Judge Grimball, and was concurred in by Circuit Judge Shipp (R. 213-224).

It thus appears that the constitutional questions were properly made at every stage in the lower courts, and that they were finally passed on and decided adversely to the contentions of the appellants by the Supreme Court of the State.

Under the practice in South Carolina, as shown by the certificate of the Clerk of Court attached to the record (R. 239), no formal judgment is entered by the

Supreme Court of the State, but the opinion itself is the final judgment.

The appellants contend in this Court, and contended in the courts below, that Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina as construed by the Supreme Court of the State in its final opinion in the present case, as well as in a long line of cases prior thereto, involve a presumption of negligence and proximate cause raised by the arbitrary force of the statutes themselves, which remains as evidence on behalf of the appellee throughout the progress of the trial and the deliberations of the jury. In other words, the appellants contend now and contended in the lower courts that the statutes have been so construed by the Supreme Court of the State as to create an inference that is not merely temporary but which is given the effect of evidence to be weighed against opposing testimony and is to prevail unless such other testimony is found by the jury to preponderate.

In the trial court, the presiding judge ruled that the case was controlled by the decision of this Court in *Mobile, etc. R. Co.* v. *Turnipseed*, 219 U. S. 35, 55 L. Ed. 78 (R. 143, 144). The gravamen of the *Turnipseed* case was that the presumption created by the statute therein involved vanished as soon as evidence was introduced by the opposing side. This was distinctly ruled by this Court in *Western & Atlantic R. Co.* v. *Henderson*, 279 U. S. 639, 73 L. Ed. 884. Immediately after the trial court held that the *Turnipseed* case controlled the present case and that the statutes under attack were to be construed under the principles laid

down in that case, the defendants filed requests to charge numbers 4 and 5, which distinctly asked the court for a construction of the statutes in question that would bring them within the ruling in the *Turnipseed* case (R. 146, 147). In short, if the *Turnipseed* case applied, there was no presumption arising under the statutes in question, and if it did arise, it vanished when opposing evidence was offered by the defendants. The court without hesitation refused both requests to charge (R. 148), and such refusal was made the basis of exceptions 7 and 8 on the appeal to the State Supreme Court (R. 172, 173).

In addition to this, the trial court charged the plaintiff's fourth request to charge, which of itself was a distinct refusal to construe the statutes in question in accordance with the principles decided in the *Turnipseed* case, and this action on the part of the trial court was made the basis of the fifth exception to the State Supreme Court.

All of these exceptions were overruled by the Supreme Court of the State and the judgment of the lower court was affirmed. This action of the State Supreme Court showed beyond any question that it held clearly and unequivocally, despite any language in the opinion seemingly to the contrary, that the presumption did not vanish when evidence was introduced.

Such being the effect of the statutes, they violate the Fourteenth Amendment to the Federal Constitution within the principles announced by this Court in *Western & Atlantic R. Co.* v. *Henderson,* 279 U. S. 639, 73 L. Ed. 884, and the court below should have

so held and declared the statutes void for the reasons stated in the decision in that case.

In addition to this, the defendants below also raised the question of the application of the case of *Baltimore & Ohio R. Co.* v. *Goodman,* 275 U. S. 66, 72 L. Ed. 167, to this case, especially under the Fourteenth Amendment to, and the commerce clause of, the Federal Constitution. The Supreme Court of the State held that, by virtue of these statutes, the law as declared by this Court in the *Goodman* case was not applicable in South Carolina, even as applied to trains engaged in interstate commerce and even though the denial of the application of the principles of such case did not afford to the railroads the same protection as it afforded to the users of highways in cases of accidents occurring by collisions at grade crossings. Other discriminatory features of the statutes were also fully argued before the State Supreme Court but these sections were held to be free of being obnoxious to the Constitution of the United States as contended by the defendants below.

D.

Cases Believed to Sustain the Jurisdiction.

Appeal is the remedy for the review of a decision of a State court of last resort where a State law is alleged to infringe the Federal Constitution.

Nashville, etc., R. Co. v. *White,* 278 U. S. 456, 73 L. Ed. 452.

Great Northern R. Co. v. *Minnesota,* 278 U. S. 503, 73 L. Ed. 477.

Home Insurance Co. v. *Dick,* 281 U. S. 397, 74 L. Ed. 926.

The Federal questions involved in the case were substantial, were properly raised, were considered by the trial court and by the Supreme Court of the State, and if they had been sustained, the judgment of the trial court would have been reversed and the complaint dismissed. They therefore presented matters properly determinable in this Court on appeal.

New York ex Rel. Bryant v. *Zimmerman,* 278 U. S. 63, 73 L. Ed. 184.

Ex Rel. Missouri Insurance Co. v. *Gehner,* 281 U. S. 313, 74 L. Ed. 870.

Home Insurance Co. v. *Dick,* 281 U. S. 397, 74 L. Ed. 926.

Grubb v. *Public Utilities Commission,* 281 U. S. 470, 74 L. Ed. 972.

Brinkerhoff-Faris, etc., Co. v. *Hill,* 281 U. S. 637, 74 L. Ed. 1107.

That Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina for 1922 deprive the appellants herein of their property without due process of law and deny to them the equal protection of the laws, we contend is settled by the decisions of this Court in the following cases:

Western & Atlantic R. Co. v. *Henderson,* 279 U. S. 639, 73 L. Ed. 884.

Mobile, etc., R. Co. v. *Turnipseed,* 219 U. S. 35, 55 L. Ed. 78.

Chicago, etc., R. Co. v. *Chicago,* 166 U. S. 226, 41 L. Ed. 979.

Frost v. *Corporation Commission*, 278 U. S. 515, 73 L. Ed. 483.

Truax v. *Corrigan*, 257 U. S. 312, 66 L. Ed. 254.

Gulf, etc., R. Co. v. *Ellis*, 165 U. S. 150, 41 L. Ed. 666.

Likewise, the following cases, we contend, demonstrate that these sections of the statutes constitute an unlawful regulation of and a burden upon interstate commerce, and are therefore void as infringing the Federal Constitution.

Atlantic, etc., R. Co. v. *Georgia*, 234 U. S. 280, 58 L. Ed. 1312.

Southern Ry. Co. v. *King*, 217 U. S. 524, 54 L. Ed. 868.

Seaboard, etc., Ry. Co. v. *Blackwell*, 244 U. S. 310, 61 L. Ed. 1160.

Baltimore & Ohio R. Co. v. *Goodman*, 275 U. S. 66, 72 L. Ed. 167.

It is, therefore, respectfully submitted that the Constitutional questions have been properly presented, that they are substantial, that they were passed on adversely to the contentions of the appellants by the State Supreme Court in its final judgment, and that by reason thereof this Court has jurisdiction of this appeal under Section 237 of the Judicial Code as amended.

Respectfully submitted,

THOMAS W. DAVIS,
HENRY E. DAVIS,
Counsel for Appellants.

(2219)

FILE COPY

OCT 19 1932

CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 194

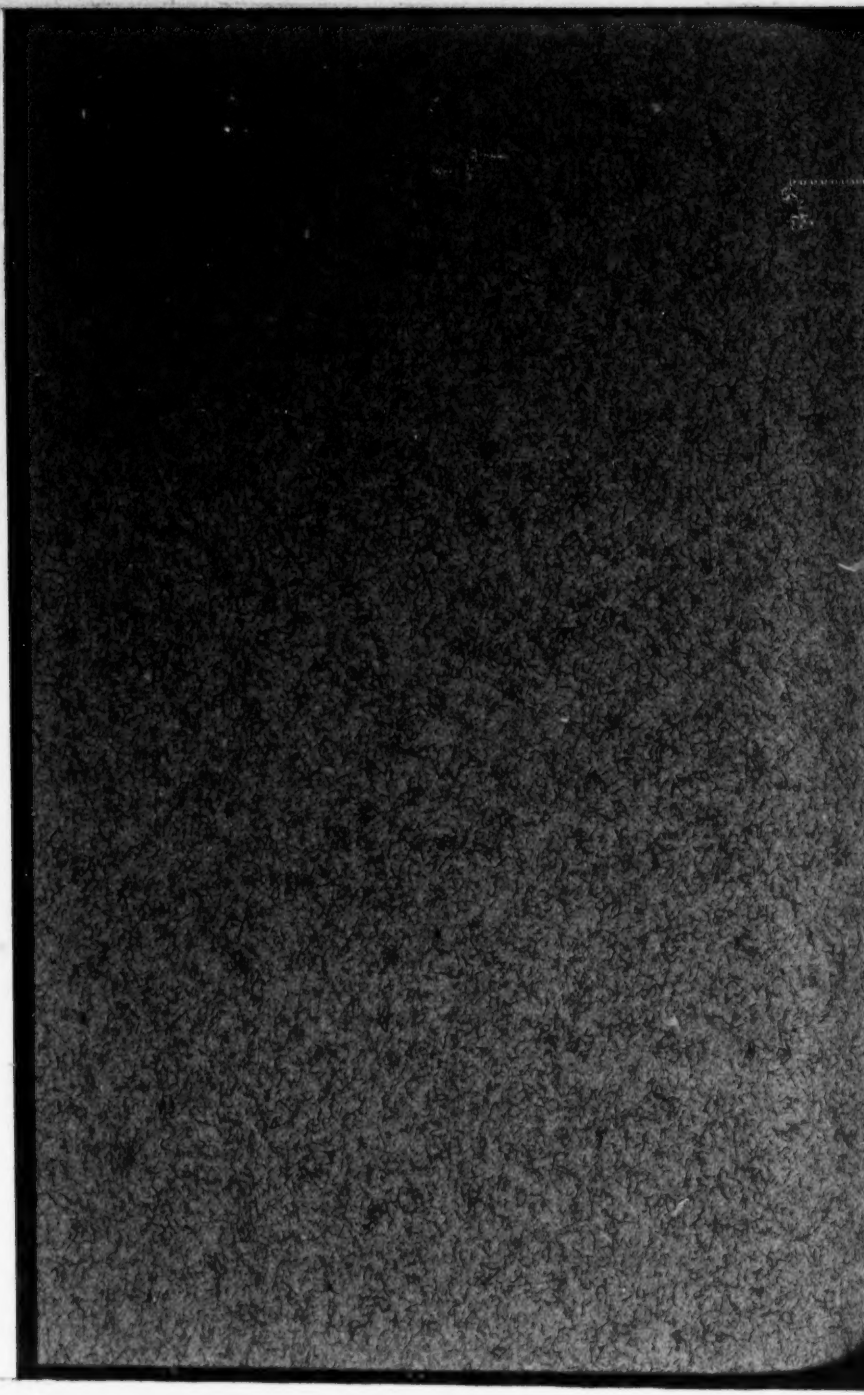
ATLANTIC COAST LINE RAILROAD COMPANY
AND WILLIAM SMITH, APPELLANTS,

vs.

KATHERINE H. FORD, APPELLEE.

BRIEF ON BEHALF OF APPELLANTS.

F. B. GRIER,
Greenwood, S. C.;
THOMAS W. DAVIS,
Wilmington, N. C.;
HENRY E. DAVIS,
Florence, S. C.;
Counsel for Appellants.



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 194

ATLANTIC COAST LINE RAILROAD COMPANY
AND WILLIAM SMITH, APPELLANTS,

vs.

KATHERINE H. FORD, APPELLEE.

BRIEF ON BEHALF OF APPELLANTS.

Official Record Below.

The opinion of the Supreme Court of South Carolina, dated May 11, 1932, has not yet been officially reported and is found in the record, pp. 144-216.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237, Judicial Code (U. S. C. A., Title 28, Section 344), as amended by the Act of February 3, A. D. 1926, Chapter 229, 43 Stat. 937, the opinion of the

Supreme Court of South Carolina being a final judgment in a suit in the highest court of the State of South Carolina. There was drawn in question the validity of Section 4925 in connection with Section 4903 of Volume 3 of the Code of Laws of South Carolina, 1922, as construed by the Supreme Court of South Carolina, and a decision was made upholding the validity of the statute.

Statement of the Case.

The suit was brought by the appellee in the Court of Common Pleas for Clarendon County, South Carolina, to recover damages in the sum of $25,000 for personal injuries alleged to have been sustained by her in a collision between a passenger train of the appellant railroad company, operated by its engineer, the appellant William Smith, and an automobile at a public highway crossing of the track of the railroad company. At the time of such collision the appellee was riding on the front seat of such automobile, which was being driven by her husband. In her complaint she alleged specifically that the accident was proximately caused by the joint negligence and wilfulness of the railroad company and its engineer in failing: (1) to keep a proper look-out, (2) to stop the train in time to avoid the collision, (3) to have the train equipped with proper brakes, (4) to have the train operated by a competent engineer, (5) to provide a safe crossing, and (6) to give the signals required by the statute of South Carolina (R., pp. 3-4).

The answer, after denying the allegations of the complaint, set up the affirmative defenses of gross con-

tributory negligence and of contributory wilfulness on the part of the appellee, and in addition alleged that sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, 1922, on which appellee specifically relied in her complaint, were null and void as being a burden upon and a regulation of interstate commerce in violation of Article I, section 8, subdivision 3, of the Constitution of the United States; and further that these sections 4903 and 4925 as construed by the Supreme Court of South Carolina denied to the appellants the equal protection of the laws and deprived them of their property without due process of law, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States (R., pp. 4-6).

The case duly came on for trial before the court and a jury. The appellee proved the collision with the train, and personal injuries sustained as a consequence (R., pp. 10, 15, 18, 24, 25, 28). She failed to introduce a scintilla of evidence, however, in support of the first six specifications of negligence and wilfulness detailed in paragraph 4 of her complaint (R., pp. 3-4), and her right to recover was left to depend entirely on the last specification, which charged failure to give the signals required by sections 4903 and 4925.

The railroad company in rebuttal proved that appellee and her husband attempted to cross its track in an automobile with the curtains up; that the crossing was at a right angle with the track which was straight and level for nearly a mile to the right, which appellee was facing; that the view was absolutely

unobstructed for all this distance; that all the signals were properly given; that the train was in all respects properly operated; and that the accident was due to the fault of appellee and her husband. It further proved that the train involved was a regular passenger train, running between Charleston, S. C., and Greenville, S. C., and that it was regularly engaged, and on the day of the accident was actually engaged, in the transportation of interstate passengers and interstate mail.

At the close of the case, the appellants moved for a directed verdict on the grounds now appearing at pages 112 and 113 of the record. The fourth of these grounds specifically asserted that sections 4903 and 4925, without which appellee could not have recovered, deprived the appellants of their property without due process of law and denied to them the equal protection of the laws in violation of the Fourteenth Amendment, and in addition constituted an unlawful burden upon and regulation of interstate commerce in violation of the commerce clause of the Constitution. This motion was refused.

Thereupon, appellants renewed their attack on the statute in question by their requests to charge, as will appear by reference to pages 118-120 of the record. All of such requests were refused (R., p. 120).

A verdict was duly rendered in favor of appellee, and a motion for a new trial was promptly made and as promptly overruled (R., pp. 132-133).

The case then went to the State Supreme Court on exceptions which appear at pages 133-143, inclusive, of

the record, and the judgment below was affirmed (R., p. 197). In these exceptions, as in the answer, the motion for a directed verdict, the requests to charge, and the motion for a new trial, the appellants raised in detail the identical constitutional questions raised in the assignment of errors presented to the Chief Justice of the State when the appeal to this Court was allowed (R., pp. 133-143, 218-219).

As construed and applied by the Supreme Court of South Carolina, the statute attacked in this appeal as being unconstitutional, which is hereinafter set out, has in effect made railroad companies insurers of both the lives and the property of travelers on highways who come into collision with railroad trains at grade crossings. So onerous and unfair to railroad companies is this statute as it is constantly applied by the highest court of the State that in all crossing accidents the railroad is always at fault if a jury so wills it, and the State courts will not as a matter of law declare to the contrary. This very case demonstrates and emphasizes the truth of this statement, as the recovery was based on evidence that could not possibly have been true and that was so completely destroyed as to leave absolutely no support for the verdict. In an effort to obtain relief, the appellants by this appeal now come to this Court and ask that such statutes be declared void as an infringement of their constitutional rights.

Specifications of Assigned Errors Intended to be Urged.

Appellants urge each and every one of the errors set forth in the assignment of errors (R., p. 222), which are as follows:

ASSIGNMENT OF ERROR No. 1.

(R., p. 218.)

The Supreme Court of South Carolina in *en banc* session erred in holding that sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, 1922, as construed by the Supreme Court of South Carolina, do not deprive the defendant railroad company of its property without due process of law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

ASSIGNMENT OF ERROR No. 2.

(R., p. 218.)

The Supreme Court of South Carolina in *en banc* session erred in holding that sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, 1922, as construed by the Supreme Court of South Carolina, do not deny to the defendant railroad company the equal protection of the laws in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

ASSIGNMENT OF ERROR NO. 3.

(R., p. 218.)

The Supreme Court of South Carolina in *en banc* session erred in holding that sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, 1922, as construed by the Supreme Court of South Carolina, do not constitute burdens upon and regulations of interstate commerce in violation of Article I, section 8, subdivision 3, of the Constitution of the United States.

ARGUMENT.

Summary of the Facts.

In the statement of the case, the appellants have made a résumé of the facts showing how the constitutional questions presented by the appeal were raised and decided in the courts below. Avoiding as much as possible any repetition, the appellants now present the following additional facts that are essential to give the Court a proper and full conception of the case.

The accident occurred at 9:30 a. m. on the railroad company's line between Manning, S. C., and Alcolu, S. C. This line crosses Black River swamp just to the north of the town of Manning, and after so doing curves to the left into a straight track which extends for a mile or more beyond the place of the accident. State highway #26, which is paved, also crosses Black River swamp to the north of Manning, coming out of the swamp close beside the track of the railroad company which it parallels to Alcolu. About three-fourths

of a mile north of the swamp, State highway #4 branches off to the right from highway #26 and crosses the railroad track at right angles. Between this highway crossing and the river swamp, there are no obstructions whatever between the railroad track and highway #26, and any person traveling on highway #26 and turning into highway #4 has a plain and unobstructed view of the track and of any trains thereon all the way to the curve after the track comes out of the river swamp, which is nearly a mile. These physical facts were established not only by the oral testimony in the case but also by the plat which was put in evidence.

On the morning of the accident, which was rainy, the husband of the appellee proceeded north out of Manning on highway #26, driving a Buick touring car, with the curtains up (R., p. 7), with appellee riding on the front seat (R., p. 8). When they reached the intersection with highway #4, they turned into it and in attempting to pass over the railroad track at the crossing of highway #4, they collided with the train. The testimony of the witnesses on behalf of appellee other than appellee herself and her husband, as well as the testimony of the witnesses for the appellants, showed beyond any question that the signals were given by the train for this crossing (R., pp. 31, 34, 43, 45, 46, 49-52, 59, 79). Two of the witnesses stopped on the opposite side of the track from that on which appellee approached it because they heard the train coming and heard the signals but did not see it as their view was obstructed by the woods on that side (R., pp. 45, 46). However, both appellee and her

husband testified that they, although riding in a car with the curtains up, looked and listened before going on the track and that they heard no signals and that they would have heard them had they been given (R., pp. 10, 15, 18, 24, 25, 28). The physical facts showed beyond any doubt that the testimony so given was untrue, as if they had looked and listened they would have been compelled to see the train which was bearing down on them on a perfectly straight and level track with absolutely nothing in the way to obstruct the view. This impossible testimony on the part of appellee and her husband raised the presumption under Sections 4903 and 4925 that the failure to give the signals was negligence on the part of the railroad company that proximately caused the accident, and this presumption based on such impossible testimony is the sole basis on which appellee recovered her judgment.

It further appeared from the evidence that the appellee had taken at least one drink of whiskey on the day of the accident (R., p. 17), that whiskey was found in the car after the wreck (R., pp. 33, 63, 64, 67, 76, 79, 83, 84, 85, 87), and the physician who treated the appellee after the accident stated that after making a thorough examination of her, he reached the conclusion that she "had drunk too much whiskey" (R., pp. 99-100). In addition, one witness testified that Mr. Ford, when asked as to what caused the accident, stated that he had taken too much whiskey (R., p. 68). From all of the testimony it would seem clear that both of the Fords were under the influence of whiskey at the time of the accident, though they denied it, and

that the signals were all properly given. This being true, there should not as a matter of law be any liability against either the railroad company or its engineer. On this point we call the Court's particular attention to the following language of Mr. Justice Cothran in his dissenting opinion, which was adopted by Judge Grimball:

> "Mr. Ford testified that he looked *as well as he could* down the track and saw no train; Mrs. Ford testified that 'the curtains were up, being a rainy, misty morning I did the best I could to look for trains. *It was hard to see*' (R., p. 24).
>
> "We have this situation presented: An automobile, with the curtains drawn, is being driven in a pouring rain, along a highway parallel with a railroad and very near to it, which gave the driver notice of the railroad; the driver makes a short turn, 60 feet from the crossing, informed of the crossing by a sign post 10 feet high with crossarms, and makes for the crossing without stopping or otherwise taking the slighest care for his safety; at any point from the turn to the crossing a coming train on a perfectly straight track could have been seen for nearly a mile; there was not an obstruction to his view at any point on the approach. It appears too plainly that if he had taken the slighest care he is obliged to have seen the train. The Court is not bound to accept his statement that he looked and did not see it or to consider it evidence" (R., p. 200).

On this evidence, the dissenting judges held that a verdict should have been directed for the defendants below.

However, thanks to sections 4903 and 4925, with the presumption of liability arising from the impossible testimony of appellee and her husband, a judgment has been returned in her favor and it has been affirmed by the Supreme Court of the State.

Points of Fact.

The points of fact we would stress under the foregoing statement of the case and summary of the evidence are:

1. The testimony of the appellee and her husband to the effect that they did not see the train, heard no signals, and that none were given, although demonstrated to be false, raised a presumption under sections 4903 and 4925 that the railroad company was guilty of negligence that was the proximate cause of the injuries received by the appellee, and that such presumption did not vanish when the defendants introduced their evidence but remained throughout the case and was considered by the jury in rendering the verdict in favor of the appellee. In fact, such presumption is the sole ground in the case on which the verdict can possibly rest.

2. The case is identical in all points with that of *Western & Atlantic R. Co.* v. *Henderson*, 279 U. S. 639, 73 L. ed. 884, and not similar in any particular to the case of *Mobile, etc. R. Co.* v. *Turnipseed*, 219 U. S. 35, 55 L. ed. 78.

3. The evidence in the instant case in behalf of the appellant railroad company was far stronger, and the

evidence in behalf of appellee much weaker, than the evidence for the appellant and appellee, respectively, as shown by the decision of this Court in *Western & Atlantic R. Co.* v. *Henderson, supra.*

4. It conclusively appears that this case is identical in point of fact to that of *Baltimore & Ohio R. Co.* v. *Goodman,* 275 U. S. 66, 72 L. ed. 167, and the decision in that case should have ruled this case regardless of sections 4903 and 4925 of the South Carolina Code.

Points of Law.

The points of law are succinctly stated in the assignment of errors quoted above, and it would be a useless repetition to restate them at this point. In the course of the discussion, we shall set forth under appropriate heads the principal reasons for contending that the statute violates the various constitutional provisions on which the appellants rely. With this statement, we now come to a discussion of the questions of law presented by the appeal.

In view of the fact that the questions of due process of law and of the equal protection of the laws arising under the Fourteenth Amendment are so closely interwoven, both brevity and clarity will be promoted by considering them to a large extent together. This brings us, therefore, to the first question arising under the assignment of errors, which may be stated thus:

I. Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, 1922, as construed by the Supreme Court of South Carolina, violate the due process

of law and the equal protection of the law clauses of the Fourteenth Amendment to the Federal Constitution, and are therefore void. (Assignment of Errors 1 and 2, R., p. 218.)

The manner in which these questions were raised has been fully set forth in the preceding part of this brief and will not be repeated here.

The judgment recovered in this case is based solely on a presumption that arises under a construction, interpretation and application by the Supreme Court of the State of sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, 1922.

It is so firmly settled as to be axiomatic that the construction and interpretation of a State statute by the highest court of the State are to be considered just as much a part of it as if actually expressed in the text.

Knights of Pythias v. *Meyer*, 265 U. S. 30, 68 L. ed. 885;

Leffingwell v. *Warren*, 2 Black 599, 17 L. ed. 261;

St. Louis, etc. Co. v. *Kansas City*, 241 U. S. 419, 60, L. ed. 1072;

Standard Oil Co. v. *Graves*, 249 U. S. 389, 63 L. ed. 662;

Thornton v. *Duffy*, 254 U. S. 361, 65 L. ed. 304;

Ward v. *Krinsky*, 259 U. S. 503, 66 L. ed. 1033;

Bunch v. *Cole*, 263 U. S. 250, 68 L. ed. 290;

Missouri, ex rel. Hurwitz v. *North*, 271 U. S. 40, 70 L. ed. 818;

Chicago, etc. R. Co. v. *Risty*, 276 U. S. 567, 72 L. ed. 703.

And in the light of such construction and interpretation, the validity of such statute under the Federal Constitution must be determined.

Price v. *Illinois,* 238 U. S. 446, 59 L. ed. 1400;
Missouri, etc. R. Co. v. *Nebraska,* 164 U. S. 403, 41 L. ed. 489;
W. W. Cargill Co. v. *Minnesota,* 180 U. S. 452, 45 L. ed. 619;
Lindsley v. *Natural, etc. Co.,* 220 U. S. 61, 55 L. ed. 369;
Purity, etc. Co. v. *Lynch,* 226 U. S. 192, 57 L. ed. 184.

A.—Judicial Construction of the Statute Under Attack.

The statute here under consideration is found in sections 4903 and 4925 of Volume 3 of the Code of South Carolina of 1922.

Section 4903 provides:

> "A bell of at least thirty pounds weight and a steam or air whistle shall be placed on each locomotive engine or interurban car, and such bell shall be rung or such whistle sounded by the engineer or fireman or motorman at the distance of at least five hundred yards from the place where the railroad crosses any public highway or street or traveled place, and be kept ringing or whistling until the engine or interurban car has crossed such highway or street or traveled place; and if such engine or car shall be at a standstill within less distance than one hundred rods of such crossing such bell shall be rung or such whistle sounded for at

> least thirty seconds before such engine or interurban cars shall be moved, and shall be kept ringing or sounding until such engine or interurban cars shall have crossed such public highway or street or traveled place: Provided, that a gong of not less than ten inches in diameter may be placed upon interurban cars in lieu of a bell as herein required and shall be sounded as herein provided."

Section 4925 declares:

> "If a person is injured in his person or property by collision with the engines or any car or cars of a railroad corporation at a crossing, and it appears that the corporation neglected to give the signals required by this Chapter, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment, as provided in the preceding section, unless it is shown that in addition to a mere want of ordinary care the person injured, or the person having charge of his person or property, was at the time of the collision guilty of gross or wilful negligence, or was acting in violation of the law, and that such gross wilful negligence or unlawful act contributed to the injury."

We do not contend that section 4903 standing alone is unconstitutional. On the contrary, we recognize it apart from section 4925 as a proper safety measure. The statute we are assailing is section 4925 with section 4903 read into it by the specific terms of section 4925. Section 4925 is clearly severable from section

4903, and if the former is declared unconstitutional, this will carry with it the latter in so far as it has been made a part of section 4925, but will still leave section 4903 in force in so far as it is a safety measure.

The South Carolina Supreme Court has thus interpreted and applied section 4925 with section 4903 read into it, as it must be by the terms of section 4925.

(See dissenting opinion of Mr. Justice Cothran, R., pp. 202-205.)

(*a*) In a suit under section 4925 for injuries received in a collision at a crossing, the failure to give the signals prescribed by section 4903 is negligence *per se*. This is settled by the cases of:

Strother v. *R. Co.*, 47 S. C. 375, 25 S. E. 272;
Callison v. *R, Co.*, 106 S. C. 123, 90 S. E. 260;
Keel v. *R. Co.*, 108 S. C. 390, 95 S. E. 64;
Timmons v. *R. Co.*, 138 S. C. 82, 136 S. E. 67.

(*b*) In a suit brought under section 4925, negligence *per se* of the railroad company arising from the failure to give the signals required by section 4903 is *presumed* to be the proximate cause of the collision at the crossing and of the injuries to the plaintiff received therein, and to warrant recovery by plaintiff without further proof.

Strother v. *R. Co.*, 47 S. C. 375, 25 S. E. 272;
Edwards v. *R. Co.*, 63 S. C. 271, 41 S. E. 458;
Bishop v. *R. Co.*, 63 S. C. 532, 41 S. E. 308;
Turbyfil v. *R. Co.*, 83 S. C. 325, 65 S. E. 278;
Lee v. *R. Co.*, 84 S. C. 125, 65 S. E. 1031;
Lawson v. *R. Co.*, 91 S. C. 201, 74 S. E. 473;

Peeples v. *R. Co.*, 115 S. C. 115, 104 S. E. 541;
Miller v. *R. Co.*, 140 S. C. 123, 138 S. E. 675;
McBride v. *R. Co.*, 140 S. C. 260, 138 S. E. 803;
Brogdon v. *R. Co.*, 141 S. C. 238, 139 S. E. 459;
Glenn v. *R. Co.*, 145 S. C. 41, 142 S. E. 801;
Whitehead v. *R. Co.*, 153 S. C. 339, 150 S. E. 769;
Stabler v. *R. Co.*, 160 S. C. 191, 158 S. E. 267.

(*c*) In a suit brought under section 4925, failure to give the signals required by section 4903 "is sufficient to warrant a reasonable inference of recklessness, wilfulness or wantonness, and therefore to carry that issue to the jury", but it is not recklessness, wilfulness or wantonness *per se*.

Goodwin v. *R. Co.*, 82 S. C. 327, 64 S. E. 242;
Rowe v. *R. Co.*, 85 S. C. 25, 66 S. E. 1056;
Callison v. *R. Co.*, 106 S. C. 123, 90 S. E. 260;
Keel v. *R. Co.*, 108 S. C. 390, 95 S. E. 64;
Miller v. *R. Co.*, 140 S. C. 123, 172-173, 138 S. E. 675;
Key v. *R. Co.*, 144 S. C. 164, 142 S. E. 336.

(*d*) The only defense available to the railroad company, aside from a denial of liability, is that the plaintiff at the time of the accident either was acting in violation of law or was acting with a "conscious disregard of consequences" amounting to wilfulness.

Glenn v. *R. Co.*, 145 S. C. 41, 142 S. E. 801.

(*e*) The issue is not, as in all other suits, as to whether the failure to give signals was *the proximate*

cause **of the accident since that is *fixed*, but whether *signals were given* and if only one witness gives testimony merely that he did not hear any signals, the case must be submitted to the jury and this will be sufficient to sustain a verdict against the railroad company for both negligence and wilfulness.**

Callison v. *R. Co.*, 106 S. C. 123, 90 S. E. 260;
Key v. *R. Co.*, 144 S. C. 164, 142 S. E. 336;
Glenn v. *R. Co.*, 145 S. C. 41, 142 S. E. 801;
Stabler v. *R. Co.*, 160 S. C. 191, 158 S. E. 267.

In *Lawson* v. *R. Co.*, 91 S. C. 201, 74 S. E. 473, the court said:

> "Where an act is negligence *per se* the jury *must find negligence.* Where it is a mere evidence of negligence, the jury may or may not find that the defendant was negligent. The failure to sound the bell or whistle has been declared by this Court to be negligence, and if the jury had believed from the evidence that neither the bell was rung nor the whistle sounded, then *they were bound to find for plaintiff.*"

Again, in *Whaley* v. *Ostendorf*, 90 S. C. 281, 73 S. E. 186, the court declared:

> "Where evidence of negligence is only *prima facie*, it is subject to rebuttal, but when there is negligence *per se*, it is *conclusive of that question.*"

The case of *Lawson* v. *R. Co., supra*, was expressly approved by the court in *Miller* v. *R. Co.*, 140 S. C. 123, 138 S. E. 675.

(*f*) **In every action *ex delicto* in South Carolina there must be proof of proximate cause except in collision cases at a crossing where a railroad is the defendant.**

Cirsosky v. *Smathers*, 128 S. C. 358, 122 S. E. 864;
McCown v. *Muldrow*, 91 S. C. 523, 74 S. E. 386;
Whaley v. *Ostendorf*, 90 S. C. 281, 73 S. E. 186.

See the dissenting opinion of Mr. Justice Cothran in *McBride* v. *R. Co.*, 140 S. C. 260, 138 S. E. 803, where the authorities are collated.

(*g*) This section 4925, with section 4903 read into it, precludes the application in South Carolina of the standard of conduct governing railroad and traveler in crossing accidents prescribed by this Court in *B. & O. R. Co.* v. *Goodman*, 275 U. S. 66, 72 L. ed. 167.

This standard, which is based on the fundamental conception of the mutual rights and the mutual obligations of the respective parties as judged by the circumstances of the situation, has been rejected by the Supreme Court of South Carolina on the ground that it conflicts with sections 4903 and 4925, and that they furnish the sole standard of conduct in that State.

Key v. *R. Co.*, 150 S. C. 29, 147 S. E. 625;
Holladay v. *R. Co.*, 150 S. C. 243, 147 S. E. 927.

From the decisions cited above, these conclusions follow: An automobile driver, without stopping, looking or listening, drives his car onto a grade crossing and collides with a train. He, or the person riding

with him, is injured. He brings suit, alleging various acts of negligence. The case comes on for trial. Plaintiff proves the fact of the collision and the injury. The evidence is overwhelming that the signals were given as required by section 4903. Plaintiff, although cooped up in a closed car, swears that he did not hear the signals. Then the challenged statute comes into play. Immediately, without proving more, due to the interpretation put on it by the court, if the jury believes, based on plaintiff's wholly negative statement, that the signals were not properly given, there is created as a matter of law a presumption that the railroad's negligence was the proximate cause of plaintiff's injury, and that such injury was wilfully and wantonly inflicted. The plaintiff is not a railroad employee—that is immaterial. There is absolutely no proof of causal connection between the failure to give signals and the collision—that is immaterial. The evidence may show that the failure to give the signals could not have caused the accident—that is immaterial. (This was the case in *McBride* v. *R. Co., supra.*) If the jury believes signals were not properly given, that is the end of it. The presumption does the rest.

But this is not all. The plaintiff says he heard no signal. The jury on this says that no signal was given, and on this the statute says that the failure to give the signal is presumed to be the proximate cause of the accident. This presumption does not give way to proof. In fact, *the question of proximate cause is not an issue at all,* but the sole issue is whether the signal was given. *It is constantly and arbitrarily p esumed*

that the failure to give the signal properly was the proximate cause of the collision, and, as we shall demonstrate, this artificial presumption is weighed by the jury as against indisputable evidence to the contrary. A verdict based on nothing but the statement of the plaintiff that he heard no signal will stand in the face of conclusive proof that signals had nothing whatever to do with the accident.

B.—This Statute, Found in Section 4903 in Connection with Section 4925 of the South Carolina Code, is Not Due Process of Law.

Of the reasons assigned for contending that due process of law is denied by this statute, some arise on the face of the sections themselves and others on the interpretation and application given to them by the courts. We consider first the invalidity of the statute as interpreted and applied by the courts.

1. *This statute raises arbitrary and unreasonable presumptions and allows the plaintiff to recover thereon without proving proximate cause.*

The purpose always in view in the prevailing opinion seems to be to get away from the fact that the presumption created by section 4925 to the effect that the failure to give the signals was both negligence *per se* and the proximate cause of appellee's injury did not vanish from the case when appellants introduced their evidence, but remained throughout the case to be considered by the jury as evidence therein. This opinion did not succeed, as indeed it could not

succeed, in showing that such presumption does not continue throughout the case; and this is the *crux* of the whole matter.

At the top of page 172 of the record, the learned justice states that no case had been brought to their attention wherein it had been held that "the presumption remained throughout the entire case to be weighed as opposing evidence in fixing liability". This statement is wholly incorrect, as all the recent cases under these statutes demonstrate. But of this we shall have more to say presently.

We are dealing with rights guaranteed by the Constitution of the United States, and such rights can not be frittered away by the mere use of words. In passing on such rights, this Court considers what the State court did, not what it said. This is conclusively established by the following decisions:

Scott v. *McNeal,* 154 U. S. 34, 38 L. ed. 892;

Kansas City, etc., R. Co. v. *C. H. Albers Commission Co.,* 223 U. S. 573, 56 L. ed. 556;

Creswill v. *Grand Lodge,* 225 U. S. 246, 56 L. ed. 1074;

Davis v. *Wechsler,* 263 U. S. 22, 68 L. ed. 143;

Lacoste v. *Department of Conservation,* 263 U. S. 545, 68 L. ed. 437;

Railroad Commission v. Eastern Texas R. Co., 264 U. S. 79, 68 L. ed. 569;

Gregg Dyeing Co. v. *Query,* 286 U. S. 472, 76 L. ed. (adv. ops.) 852.

Such being the principles by which the case is to be decided here, the inquiry is: What did the State Supreme Court do?

When the appellants moved for a directed verdict, the trial court overruled the motion on the ground that sections 4903 and 4925 were constitutional by reason of the decision of this Court in the case of *Mobile, etc. R. Co.* v. *Turnipseed,* 219 U. S. 35, 55 L. ed. 78 (R., p. 117).

The gravamen of the decision in the case of *Mobile, etc. R. Co.* v. *Turnipseed, supra,* is that the presumption of liability vanished as soon as the defendant introduced evidence, and the appellants, after the Court had ruled that this case saved these sections from the vice of unconstitutionality, sought to have the benefit of the principles decided by such case. They therefore presented requests to charge 4 and 5 squarely raising this issue, and these requests were flatly refused by the Court (R., pp. 119, 120). These requests to charge read as follows:

> "4. I charge you that under a proper construction of sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, the failure to give at the highway crossing involved in this suit the signals required thereby (if there by such failure) affords no presumption whatever that such failure was the proximate cause of the collision between the automobile in which plaintiff was riding and (fol. 150) the train of the defendant railroad company, but plaintiff must prove what was the proximate cause of such collision and that the defendants were responsible therefor."
>
> "5. I charge you that under a proper construction of Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, as soon as the railroad company introduced evidence

> rebutting plaintiff's evidence that the signals required thereby were not properly given for the crossing involved in this suit, the temporary inference of fact arising from plaintiff's evidence completely vanished from the case and there is now no presumption whatever that the collision was caused by the negligence of the defendants as a proximate cause thereof, and it is incumbent on plaintiff to prove what was the proximate cause of such collision and that the defendants were responsible therefor."

In addition, as shown by Mr. Justice Cothran in his dissenting opinion (R., p. 207), the trial judge, in adopting and charging appellee's fourth request to charge, in effect "charged that the presumption arising from the failure to give the signals may be considered with any and all other evidence in the case."

The appellee's fourth request to charge (R. pp. 129, 130), which the trial judge gave is as follows:

> " '4. I further charge you that failure to give the signals in the manner provided and required by the statute read to you is negligence *per se,* or negligence as a matter of law, and that such circumstances, if shown, may be considered with any and all other evidence in the case in considering the question of wilfulness. The statute requires that the whistle shall be kept sounding or the bell kept ringing until the engine has crossed the highway. Where the signals are not given as in the manner provided by statute, and an injury occurs at the crossing of railroad and public highway, a presumption would arise that the failure to give the signals is the proximate cause of the injury. But such

> presumption would be rebuttable by evidence, and the jury should consider any and all evidence that may be in the case in determining the question of proximate cause.' That is true. As I explained to you in connection with that statute just now, the failure to give these signals raises that presumption, but it is rebuttable; it is not a conclusive presumption. That may be rebutted by the defendants by its evidence, and as stated here, all the evidence must be considered in determining the question of proximate cause."

It thus affirmatively appears that the trial judge, in this very case, both negatively and positively held that the presumption raised by the statute did not vanish when the defense introduced their evidence but continued throughout the case to be considered by the jury in fixing liability.

On the appeal to the State Supreme Court, error was charged in this action of the trial judge in refusing to charge requests 4 and 5 on the part of the defense and in charging request number 4 on the part of the plaintiff below (Exceptions 5, 7 and 8, R., pp. 137-140). If these sections are to be construed by the rule laid down by this Court in the *Turnipseed* case, exceptions 7 and 8 in the court below, addressed to the refusal to charge requests 4 and 5 on the part of the defense, should have been sustained. Likewise, exception 5 in the court below, addressed to the error in charging request number 4 on the part of the plaintiff, should have been sustained. If these three exceptions in the court below had been sustained, the

Turnipseed case would have been applied and the judgment in favor of the appellee would have been reversed. But instead of doing this, the Court declares at the end of its opinion (R., p. 197) that "all the exceptions presented have received the careful consideration of the Court and are overruled." This conclusively demonstrates that regardless of any language used in the opinion, the action of the Court can only be construed as holding that the presumption created by this statute continued throughout the entire case. This is the inescapable conclusion when we apply the principle that this Court looks to what was done and not to what was said.

In the following analogous cases the Supreme Court of South Carolina has held that a presumption of liability does not vanish "on the introduction of opposing evidence" but remains throughout the entire case to be given "the effect of evidence to be weighed against opposing testimony" of the defendant:

Baker v. *Tel. Co.*, 57 S. C. 174, 69 S. E. 151;
McLeod v. *R. Co.*, 95 S. C. 71, 76 S. E. 79;
Glenn v. *R. Co.*, 96 S. C. 357, 80 S. E. 898;
Matthews v. *R. Co.*, 98 S. C. 204, 82 S. E. 138;
Ervin v. *R. Co.*, 106 S. C. 354, 91 S. E. 317;
Perryman v. *R. Co.*, 105 S. C. 34, 89 S. E. 497;
Thompson v. *R. Co.*, 113 S. C. 261, 102 S. E. 11;
Cato v. *R. Co.*, 164 S. C. 123, 162 S. E. 239.

It is quite true that no crossing case in South Carolina has come out and held in so many words that the presumption arising under this statute continues

throughout the case to be weighed against opposing evidence, but the action of the Court in every such case compels the conclusion that such is the effect of such presumption In fact, the argument that the presumption does not continue throughout the case to be considered by the jury as evidence is a shining example of *reductio ad absurdum.* If a witness testifies that no signals were given and no proof to the contrary is adduced, this statute, as construed by the highest court of the State, declares that the failure to give the signals is negligence *per se* and that a presumption arises therefrom that such failure was the proximate cause of the injury. Should there be no evidence in rebuttal, the presumption continues throughout the case. This much must be admitted because there is nothing to cause it to disappear. The situation is in no way different when evidence is offered by the defense in rebuttal. This evidence is not, and can not be, offered against the presumption as to proximate cause, but is addressed solely to the giving of the signals. Under such evidence, the jury finds whether signals were given, and the statute, with its arbitrary presumption as to proximate cause, makes out a case for the plaintiff. If the presumption does not vanish from the case when it is admitted that no signals were given, why does it vanish when the jury finds from the evidence that no signals were given? This demonstrates the utter fallacy of the contention. In fact, the matter is conclusively set at rest by the decision of this Court in *Western & Atlantic R. Co.* v. *Henderson,* 279 U. S. 639, 73 L. ed. 884, where this language is used:

> "By authorizing the jury, *in the absence of evidence,* to find negligence in the operation of the engine and train, the Court necessarily permitted the presumption to be considered and weighed as evidence against the testimony of defendant's witnesses tending affirmatively to prove such operation was not negligent in any respect." (Italics added.)

From this quotation it is clear that this Court has declared that a finding of negligence must be held to rest either on evidence or on presumption. Under the Georgia statute, the plaintiff proved the collision, but was not required to prove that it was the result of actionable negligence. On this, the statute raised a presumption of such negligence. So that in reaching a verdict, the jury could not weigh evidence of actionable negligence offered on the part of the plaintiff against evidence of no such negligence offered on the part of the defendant, because the plaintiff was not required to show that the acts he complained of constituted actionable negligence at all. Hence the jury in making its findings necessarily weighed the presumption in favor of the plaintiff against the positive evidence in favor of the defendant. Precisely the same situation is presented under the statute here assailed. The plaintiff is required to produce no evidence whatever either on the question of negligence or on the question of proximate cause, but is required merely to produce some evidence, it matters not how flimsy, on the question of the giving of signals. On such evidence as to failure to give signals, just as on the evidence as to the happening of the accident under the

Georgia statute, arises a two-fold presumption as to negligence and proximate cause or a presumption of actionable negligence. In reaching a verdict under this South Carolina statute, the jury does not weigh evidence of actionable negligence offered on the part of the plaintiff against evidence of no such negligence offered on the part of the defendant, because the plaintiff is not required to show that the acts of which he complains constitute either negligence or the proximate cause of his accident. Hence, the jury in coming to a conclusion must, under this statute, weigh the presumption as to actionable negligence arising in favor of the plaintiff against the positive evidence of the defendant. No other conclusion is possible, and to argue otherwise is but beating the air against the decision of this Court in the *Henderson* case.

The late cases of *Whitehead* v. *R. Co.*, 153 S. C. 339, 150 S. E. 769, and *Brogdon* v. *R. Co.*, 141 S. C. 238, 139 S. E. 459, declare that the rule of interpretation of this statute to be followed in the future is that announced in *McBride* v. *R. Co.*, 140 S. C. 260, 138 S. E. 803. This was repeated in the case at bar. The rule announced in the *McBride* case is expressed in these words:

> "From our consideration of this question, we are satisfied that the proper construction of the statute leads to the conclusion that when a person is injured by a collision with the engines or any car or cars of a railroad corporation at a crossing, and the railroad failed to give the statutory signals at such time and place, the presumption arises that the failure to give the signals is the proximate cause of the injury,

> since such injury is the natural and probable consequence of the failure to give the signals and is the very injury intended to be prevented by the statute."

Now, couple this statement with the further rule announced in *Lawson* v. *R. Co.*, 91 S. C. 201, 74 S. E. 473, *Callison* v. *R. Co.*, 106 S. C. 123, 90 S. E. 260, *Key* v. *R. Co.*, 144 S. C. 164, 142 S. E. 336, *Glenn* v. *R. Co.*, 145 S. C. 41, 142 S. E. 801, and *Stabler* v. *R. Co.*, 160 S. C. 191, 158 S. E. 267, that if even one witness testifies that he heard no signals, while a host of others testify they were given, the jury may find they were not given and on such finding alone render a verdict for the plaintiff, and we have a summary of the effect of this rather remarkable statute.

As thus construed, its invalidity as a denial of due process of law would seem to be settled by the recent decision of this Court in *Western & Atlantic R. Co.* v. *Henderson*, 279 U. S. 639, 73 L. ed. 884. In that case, plaintiff's intestate was killed in a collision at a railroad grade crossing between a truck he was driving and a train of the railroad. Plaintiff recovered under a statute of Georgia which declared that on proof of the happening of such an accident a presumption arose that it was due to the negligence of the railroad as a proximate cause. In the course of its opinion reversing the judgment and holding the statute void as a denial of due process of law, this Court said:

> "Upon the mere fact of collision and resulting death, the statute is held to raise a presumption that defendant and its employees were negligent in each of the particulars alleged, and

that every act or omission in plaintiff's specifications of negligence was the proximate cause of the death; and it makes defendant liable unless it showed due care in respect of every matter alleged against it. And by authorizing the jury, in the absence of evidence, to find negligence in the operation of the engine and train, the Court necessarily permitted the presumption to be considered and weighed as evidence against the testimony of defendant's witnesses tending affirmatively to prove such operation was not negligent in any respect.

"Appellee insists that paragraph 2780 is valid, and argues that *the presumption, being one established by statute,* has the effect of evidence and that it is for the jury to decide whether the company's evidence is sufficient to overcome the presumption; that 'it should not as a matter of law be dissipated the instant any testimony is taken against it'; and that the issue is to be determined on a consideration of all the evidence *including the presumption.*

"Legislation declaring that proof of one fact or group of facts shall constitute *prima facie* evidence of an ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred. A *prima facie* presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. *A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it, violates the due process clause of the 14th Amendment. Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property.*" (Italics added.)

And then it reached this conclusion:

> "The *presumption* raised by par. 2780 is *unreasonable* and *arbitrary* and violates the due process clause of the 14th Amendment. *Manley* v. *Georgia, supra; McFarland* v. *American Sugar Co.*, 241 U. S. 79, 60 L. ed. 899, 36 Sup. Ct. Rep. 498; *Bailey* v. *Alabama*, 219 U. S. 219, 55 L. ed. 191, 31 Sup. Ct. Rep. 145."

This case has been approved and followed in the two recent cases of *Bandini Petroleum Co.* v. *Superior Court*, 284 U. S. 8, and *Heiner* v. *Donnan*, 285 U. S. 312.

The prevailing opinion, however, seeks to get away from the destructive effect of the *Henderson* case on this statute by reciting the fact that the complaint in that case contained six allegations of negligence and that the statute there involved raised a presumption of liability as to each of such charges (R., pp. 167-170). The attempted distinction is absolutely groundless. In the first place, this Court held clearly and unequivocally in the *Henderson* case that the statute of Georgia was void because it "permitted the presumption to be considered and weighed as evidence against the testimony of defendant's witnesses tending affirmatively to prove" that the operation of the train was not negligent in any respect, and further that it was *arbitrary*. This being true, it did not make any difference whether the complaint contained one allegation of negligence or a thousand, as the statute would have been just as much void in the one instance as in the other.

It is well settled in South Carolina, as elsewhere, that a plaintiff does not have to prove all of his allega-

tions of negligence but can recover on one material allegation alone. The present case is a perfect example of this fact, as the recovery here is on the last allegation in the complaint, which allegation was not supported by proof but merely by the very presumption against which we are now contending.

Now why should a statute be void as denying due process of law and the equal protection of the laws that authorizes a recovery on a presumption based on six allegations of negligence, while another is perfectly valid under the same constitutional provisions that authorizes a recovery on a presumption based on a single allegation of negligence? By the same process of reasoning, a magazine rifle is a deadly weapon while a single shot rifle carrying the same cartridge is a harmless toy. The effect of each on the victim is the same; but, of course, under the contentions of the advocates of the validity of this statute, this makes no difference. Unfortunately for them, however, the decisions of this Court may effect the test of constitutionality, and thus with one blow demolish all of their theories.

In the leading opinion, it is attempted to be argued that there is a causal connection between the failure to give signals and the happening of an accident at a crossing (R., pp. 176-177). In doing this, the Court was merely reiterating what had been previously decided in the *McBride* case, *supra*, in which the Supreme Court of South Carolina declared that collision and injury at a crossing is "the natural and probable consequence of the failure to give the signals". This Court completely

annihilated such contention in the *Henderson* case, using this language:

> "The mere fact of collision between a railway train and a vehicle at a highway grade crossing *furnishes no basis* for any inference as to whether the accident was caused by negligence of the railway company or of the traveler on the highway or both or without fault of anyone. *Reasoning does not lead from the occurrence back to its cause*".

But suppose we go a step further. This Court in the *Henderson* case declared that if a presumption is *arbitrary*, the statute is invalid. That the presumption here under discussion is arbitrary is conclusively demonstrated by the action of the court in *McBride* v. *R. Co.*, 140 S. C. 260, 138 S. E. 803, and *Stabler* v. *R. Co.*, 160 S. C. 191, 158 S. E. 267. In the *McBride* case, the court applied the presumption that the failure to give the signals was the proximate cause of the injury *in favor of a man who admitted he was on the track in a condition, by reason of an epileptic fit, in which he could hear nothing.* In the *Stabler* case, they applied the same presumption in favor of a man riding in a truck, who, the court admitted, *could not have heard the signal if it had been given*, as it would have been drowned by the noise of the truck. If any presumption could be more arbitrary, we can not conceive of it.

Unless this Court shuts its eyes to the obvious, it must know that hundreds of travelers are killed each year on our highways in automobile accidents, many of which do not involve railroad collisions; that automobile

drivers are notorious for their non-observance of speed and other traffic regulations; and that most, if not all, of the fatalities in motor accidents on the highways of this country are due to the negligence, not to say wilfulness, of the drivers. Indeed, so well known is the manner of operating automobiles that the Supreme Court of Tennessee recently described it in *Southern Railway Co.* v. *Simpson,* 149 Tenn. 458, 261 S. W. 677, in these words:

> "A murderous contempt for all regulations ordained to control their movements is too common among those operating motor vehicles to justify the court in permitting such lawlessness to be rewarded, unless the statutes so compel".

In the face of all this, to say that in *all* collisions between a railroad train and an automobile at a grade crossing, the collision is "the natural and probable consequence of the failure to give the signals" is a conclusion wholly groundless and against the experience of mankind. Its fallacy was tersely but conclusively demonstrated by the *Henderson* case in the language quoted above.

That there is no necessary causal connection between the failure to give signals and a collision at a crossing not only is demonstrated by the *Henderson* case, but is supported by a multitude of other authorities. A vast number of these are collated in the dissenting opinion of Mr. Justice Cothran in the case of *McBride* v. *R. Co.,* 140 S. C., on pages 285 to 293, inclusive, and a host of others will be found in Century Digest, title Railroads, sections 1090-1095; in First, Second and

Third Decennial Digests, title Railroads, section 337 (5); and in the Annuals of the American Digest, title Railroads, section 337 (5).

It is said, however, that this statute falls under the case of *Mobile, etc. R. Co.* v. *Turnipseed*, 219 U. S. 35, 55 L. ed. 78. As has already been stated, the lower court, in refusing the motion for a directed verdict, so held, but in so doing, utterly failed to grasp the significance of either the *Henderson* case or the *Turnipseed* case. The Supreme Court of the State, in the leading opinion, also failed in the same respect, as it held in one breath that the *Turnipseed* case controlled this case, and in the very next breath overruled all of appellants' exceptions that complained of error on the part of the trial court in failing to give them the benefit of the *Turnipseed* case. If the *Turnipseed* case applied, the railroad company was entitled to have the statute construed in accordance therewith, and on the other hand, if the *Henderson* case applied, the verdict should have been directed. There was absolutely no middle ground.

The facts and ruling in the *Turnipseed* case were briefly these: Hicks was an employe of the railroad and was killed while on duty. His administrator, Turnipseed, sued his employer in a Mississippi state court. Plaintiff won below and in the Supreme Court of Mississippi. The trial judge applied section 1985 of the Mississippi Code which is as follows:

> "Injury to persons or property by railroads *prima facie* evidence of want of skill, etc. In all actions against railroad companies for

> damages done to persons or property, proof of injury inflicted by the running of the locomotives or cars of such company shall be *prima facie* evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury. This section shall also apply to passengers and employees of railroad companies".

The statute was attacked on the ground that it violated the due process and equality clauses of the Fourteenth Amendment.

The Court sustained the act on the ground that (1) it constituted a mere rule of evidence, not *a rule of liability* (see *Easterling Lumber Co.* v. *Pierce*, 235 U. S. 380, 382, 59 L. ed. 279, specifically so holding); (2) it was limited to cases where either an employe or passenger sued—in other words, it applies only where plaintiff and defendant railroad are related by contract; (3) it created a mere rebuttal inference relating to a matter peculiarly within the railroad's knowledge; (4) as soon as proof was introduced, the inference ended—in other words, the presumption could not be weighed against actual testimony; and (5) such a rebuttable and reasonable inference or presumption was valid when there was "some rational connection between the fact proved and the ultimate fact presumed".

The reason for sustaining the statute in the *Turnipseed* case is thus stated by this Court in the *Henderson* case:

> "Each of the state enactments raises a presumption from the fact of injury caused by the running of locomotives or cars. The Mississippi

> statute created merely a temporary inference of fact that vanished upon the introduction of opposing evidence. *Gulf, M. & N. R. Co.* v. *Brown,* 138 Miss. 39, 66, et seq., 102 So. 855; *Columbus & G. R. Co.* v. *Fondren,* 145 Miss. 679, 110 So. 365. That of Georgia as construed in this case creates an inference that is given effect of evidence to be weighed against opposing testimony and is to prevail unless such testimony is found by the jury to preponderate".

Indeed, as appears from the decisions of the Supreme Court of Mississippi in *Gulf, etc. Co.* v. *Brown,* 138 Miss. 39, 102 So. 855, *Columbus, etc. R. R. Co.* v. *Fondren,* 145 Miss. 679, 110 So. 365, and numerous other cases, the statute involved in the *Turnipseed* case *disappears completely* when the facts come out, the rule being stated thus:

> "Where the facts are in evidence, the jury must determine the negligence or lack of negligence from the evidence and not from the statute. Where the defendant's version of the facts is disputed by the plaintiff, then the duty devolves upon the jury to determine the truthfulness of the testimony; they can not sidestep that duty by invoking the statute in such cases".

Following the decision of this Court in the *Henderson* case, the Supreme Court of Mississippi in the case of *New Orleans, etc. R. Co.* v. *Walden,* 160 Miss. 102, 133 So. 241, held that unless the evidence by the plaintiff is undisputed, no instruction should be given to the jury on the statutory presumption.

In the case of *Seaboard, etc. R. Co.* v. *Fountain,* 173 Ga. 593, 160 S. E. 789, the court had under considera-

tion the crossing statute of Georgia which was adopted after this Court in the *Henderson* case declared the statute there involved to be invalid. This second statute of Georgia was identical with the statute of Mississippi involved in the *Turnipseed* case. The trial court charged the jury that proof of the injury inflicted by the running of the locomotive or cars of a railroad company was *prima facie* evidence of negligence, but that this was subject to rebuttal, and if the railroad showed to the satisfaction of the jury that it exercised proper care, such *prima facie* case would be rebutted. The Supreme Court of Georgia held that the instruction was erroneous and would render the statute unconstitutional if adopted, using this language:

> "Thus the Supreme Court of the United States by clear implication holds that the Mississippi Statute which we have under consideration would be unconstitutional and void if the Supreme Court of that State had held that it had any greater effect than to create a mere inference which would disappear whenever the railroad company introduced any evidence tending to disprove the existence of such negligence. In view of the construction of the Mississippi Statute by the Supreme Court of that State and the Supreme Court of the United States, we feel constrained to hold that the instruction complained of by the railroad company was erroneous and that a new trial should be granted."

How vastly different is the effect of the statute here assailed! Neither it nor its arbitrary presumption ever disappears from the case, but both remain throughout,

and on such presumption and such presumption *alone* and unsupported by a shred of testimony, the jury may (and one case, *Lawson* v. *R. Co., supra,* says they *must*) find a verdict against the railroad company supposed to be based on its negligence as a proximate cause.

Again, this Court expressly sustained the statute involved in the *Turnipseed* case on the ground that it did not declare *a rule of liability.* The statute here under attack does declare a rule of liability that has been adopted as a matter of convenience.

Charleston, etc. R. Co. v. *Varnville Furniture Co.,* 237 U. S. 597, 59 L. ed. 1137.

These considerations, we respectfully submit, effectually dispose of the contention that this statute can be sustained under the decision in the *Turnipseed* case.

But to come again to the *Henderson* case. The Georgia statute there involved declared that upon proof of injury to a person by a servant or instrumentality of a railroad, there arose "not only a presumption of negligence by the company, but a presumption that the company's negligence was the proximate cause of the injury."

Western, etc. R. Co. v. *Dobbs,* 36 Ga. App. 516, 137 S. E. 407;

Georgia, etc. R. Co. v. *Bailey,* 9 Ga. App. 106, 70 S. E. 607;

Central of Georgia R. Co. v. *Barnett,* 35 Ga. App. 524, 134 S. E. 126;

Payne v. *Wells,* 28 Ga. App. 29, 109 S. E. 926;

Murphy v. *Georgia R., etc. Co.,* 146 Ga. 297, 91 S. E. 108;

Georgia, etc. R. Co. v. *Thornton,* 144 Ga. 381, 87 S. E. 383;
Western, etc. R. Co. v. *Thompson,* 144 S. E. 831;
Ellenberg v. *Southern R. Co.,* 5 Ga. App. 389, 63 S. E. 240.

In short, under the Georgia statute, a plaintiff proves that he is injured in a collision at a railroad crossing, and the twofold presumption arises (1) that the railroad was negligent, and (2) that such negligence was the proximate cause of the injury. Under Sections 4903 and 4925, a plaintiff proves his injury at a crossing and swears he heard no signals, and from this a jury may find that signals were not given, even against the contrary testimony of any number of witnesses, from which finding arises the twofold presumption (1) that the railroad was negligent, and (2) that such negligence was the proximate cause of the injury. When thus placed in juxtaposition, the statute of Georgia condemned in the *Henderson* case, and Sections 4903 and 4925 here assailed are seen to present no essential difference. Under the Georgia statute, the plaintiff proves injury by collision, *but does not prove proximate cause.* Under the South Carolina statute, the plaintiff proves his failure to hear signals, but *does not prove proximate cause. Both statutes are identical in that they do not require proximate cause to be proved,* but instead permit this indispensable element of the right of plaintiff to recover to be *supplied by presumption.* Indeed, as we interpret it, this is the real ground of the decision in the *Henderson* case.

It is elementary that a party may not be mulcted in damages merely because of negligence. The negligent act must cause, in whole or in part, the injury complained of. Proximate cause is not a fact which is subject to inference or presumption. It must be proved by the plaintiff and so proved as to take the cause of the accident out of the "realm of speculation and conjecture."

Atchison, etc. R. Co. v. *Toops*, 281 U. S. 351, 74 L. ed. 896;

Chicago, etc. R. Co. v. *Coogan*, 271 U. S. 472, 70 L. ed. 1041;

New Orleans, etc. R. Co. v. *Harris*, 247 U. S. 367, 62 L. ed. 1167;

Patton v. *R. Co.*, 179 U. S. 658, 45 L. ed. 361.

The precise question came before this Court in the comparatively recent case of *Sweeney* v. *Erving*, 228 U. S. 233, 57 L. ed. 815, which was a suit by a patient against a physician for personal injuries received from X-ray burns during the course of treatment. The Court held that while there might be an inference of negligence from the fact of the burns—*res ipsa loquitur*—yet the burden remained on the plaintiff throughout the trial to show that such negligence was actionable, that is, *that it was the proximate cause of the injury.*

The rule is thus stated in 22 R. C. L., 206:

> "The modern rule is that while the violation of a statute is negligence, yet to entitle the plaintiff seeking to recover damages for an injury sustained, *he must show a causal connection between the injury received and the disregard of*

the statutory prohibition or mandate—that the injury was the proximate result". (Italics added.)

This statement of the principle is supported by text writers and decided cases "innumerable as the stars for multitude," as will appear by the collation of the authorities in the dissenting opinion of Mr. Justice Cothran in *McBride* v. *R. Co.*, 140 S. C. at pages 282 to 290, inclusive. In fact, the prevailing opinion in the *McBride* case recognizes the application of this principle in all cases other than those arising under Sections 4903 and 4925, and then seeks to draw a distinction in cases under these sections that will warrant a presumption of proximate cause. This alleged distinction is that the collision was the natural and probable consequence of the failure to give the signals—a view that was rejected in the *Henderson* case.

In the *McBride* case, it is stated that these sections were designed as safety measures, and that this also justifies dispensing with the necessity of proving proximate cause by the plaintiff. But merely calling them safety measures by name does not make them such in fact.

Washington, etc. R. Co. v. *Roberge*, 278 U. S. 116, 73 L. ed. 210.

Section 4903, standing alone, may be freely conceded to be a safety measure and as such constitutional, but coupled with Section 4925, it has no such purpose. Section 4925 was intended to afford a right of recovery in favor of a person injured at a railroad crossing;

and as construed by the courts it was further intended to give every advantage to such plaintiff and every disadvantage to the railroad. As thus construed, it practically insures a recovery by a plaintiff in a damage suit for a crossing collision and does not bear the remotest resemblance to a proper safety regulation. Due process of law requires that the law operate exactly alike on both plaintiff and defendant (*United States* v. *Cruikshank*, 92 U. S. 542, 23 L. ed. 588), and when so-called regulations fail so to do, they must fall.

This provision of the Fourteenth Amendment extends to every instrumentality of the state, and in determining whether due process has been afforded to the party invoking the provision, the courts must look to substance, and not to form.

> *Chicago, etc. R. Co.* v. *Chicago*, 166 U. S. 226, 41 L. ed. 979.

This statute may be a safety regulation in form; but in substance, it is not. Hence this can not save it.

Coming back to the specific point, the authorities are legion that in order for one injured at a railroad crossing to "recover he must be able to show that the omission of the signals was the proximate cause of his injury."

> 3 Elliott on Railroads (last ed.), sec. 1652;
> 3 Elliott on Railroads (3d ed.), sec. 1648;
> 1 Shearman & Redfield on Negligence, Secs. 25, 26;
> Bigelow, Torts, 608-626;
> 3 Lawson, Rights, etc., sec. 1183;
> 33 Cyc. 1045;

Railroad Co. v. *Hoadley,* 122 Ill. App. 165;
Railroad Co. v. *Mertz,* 40 So. 60 (Ala.);
Butcher v. *R. Co.,* 37 W. Va. 180, 16 S. E. 457;
Chicago, etc. Co. v. *Crisman,* 19 Col. 30, 34 P. 286;
Pennsylvania Co. v. *Rathgeb,* 32 Ohio St. 66;
Cleveland, etc. Co. v. *Baker,* 24 Ind. App. 152, 54 N. E. 814;
Morier v. *Hines,* 81 N. H. 48, 122 Atl. 330;
Elgin v. *R. Co.,* 220 Ill. 462, 77 N. E. 151;
Southern Co. v. *Daves,* 108 Va. 378, 61 S. E. 748;
Kujawa v. *R. Co.,* 135 Wis. 562, 116 N. W. 249;
Texas, etc. Co. v. *McKissack,* 152 S. W. 815 (Tex.);
Southern Co. v. *Crawford,* 164 Ala. 178, 51 So. 340;
Ackerman v. *R. Co.,* 58 Ind. App. 212, 108 N. E. 144;
Texas, etc. Co. v. *Hemphill,* 58 Tex. Civ. App. 232, 125 S. W. 240;
Horn v. *R. Co.,* 54 Fed. 301;
East, etc. R. Co. v. *King,* 81 Ala. 177, 2 So. 152;
Central, etc. R. Co. v. *Brinson,* 70 Ga. 207;
Toledo, etc. R. Co. v. *Jones,* 76 Ill. 425;
Wabash, etc. R. Co. v. *McNown,* 53 Ind. App. 116, 99 N. E. 126;
Parker v. *R. Co.,* 86 N. C. 221;
Stahl v. *Lake, etc. R. Co.,* 117 Mich. 273, 75 N. W. 629;
Century Digest, Title Railroads, secs. 1090-1095;

First, Second and Third Decennial Digests, Title Railroads, Sec. 337 (5);
Annuals of American Digests, Title Railroads, Sec. 337 (5).

It is said, however, that the State Court in the *McBride* case held that this causal relationship raised by presumption was not thereby "shown conclusively" and that the presumption established a *prima facie* case that might be overcome by testimony, and that this saves the statute from the condemnation of the *Henderson case.* Not so.

As appears from the case of *Central, etc. R. Co.* v. *Barnett,* 35 Ga. App. 524, 134 S. E. 126, the Appellate Court of Georgia, in construing the statute held invalid in the *Henderson* case, held that the burden of proof remained on the plaintiff throughout the trial to sustain the *prima facie* case made out by the presumption; yet, regardless of this, this Court held that the presumption vitiated the statute. So the fact the presumption makes out only a *prima facie* case has no weight. In fact, all that this statement in the *McBride* case means is that the defendant railroad has an opportunity to *introduce evidence* to show, just as it had under the Georgia statute, that it was not responsible for the accident—with this important difference, however, in favor of the Georgia statute: There the railroad could rebut the case made by plaintiff in practically any way it saw fit; while under the construction given to sections 4903 and 4925 by this Court, in the recent case of *Glenn* v. *R. Co.,* 145 S. C. 41, 142 S. E. 801, the railroad, in rebutting plaintiff's case estab-

lished by this arbitrary presumption, is confined to the two affirmative defenses of wilful conduct and violation of law on the part of the plaintiff at the time of the collision.

The trial court in the case of *Seaboard, etc. R. Co.* v. *Fountain,* 173 Ga. 593, 160 S. E. 789, ruled that the presumption arising under the Georgia statute, which was an exact copy of the Mississippi statute involved in the *Turnipseed* case, made out a *prima facie* case which was subject to rebuttal. This is exactly what the Court has ruled in the instant case, and in so doing states that all constitutional objections are removed. In reversing such ruling, the Georgia Supreme Court held that if so construed the statute was clearly unconstitutional under the *Henderson* case, which is undoubtedly correct.

So that even if the arbitrary presumptions of these statutes were subject to rebuttal, this would not save them. Complete dissipation of these presumptions as a matter of law on the coming in of opposing testimony, and not an empty right of rebuttal resting on the whim and caprice of a petit jury, is the least that can possibly save these statutes from condemnation.

Prior to the decision in the *McBride* case, the circuit courts could direct verdicts in crossing cases, and they would be sustained. But since that case and those that have followed it, no circuit judge can now say as a matter of law either that this arbitrary presumption has been overcome, or that the plaintiff was responsible for the accident. Under the present state of the decisions, the jury and the *jury alone* can say whether this presumption has been rebutted, and *the jury can*

render a verdict on the presumption alone without a scintilla of evidence to support it. This is exactly what was condemned in the *Henderson* case.

In the case of *Whitehead* v. *R. Co.*, 153 S. C. 339, 150 S. E. 769, the Court declared that when testimony was given to the effect that no signal was given, it

> "is presumed to have contributed to the alleged injury as a proximate cause thereof; that is, a *prima facie* case was established. Such presumption may be overcome by evidence, but, as stated above, *whether or not such presumption was overcome by evidence is as a general rule a question for the jury,* and the Trial Judge should refuse to submit question to the jury only in cases where there is no conflict in the testimony and the only reasonable inference to be drawn therefrom leads conclusively to the conclusion that the person injured was at the time of the collision guilty of gross or wilful negligence, or was acting in violation of law, and that such gross or wilful negligence or unlawful act contributed to the injury as a direct and proximate cause thereof." (Italics added.)

The same Judge substantially repeated this statement of the rule in his concurring opinion in the case of *Stabler* v. *R. Co.*, 160 S. C. 191, 158 S. E. 267. The same thing was held in the case at bar.

So that the Supreme Court of South Carolina has interpreted this statute as giving rise to a presumption of negligence as a proximate cause of an injury at a crossing on testimony that signals were not given, and holds that such is a *prima facie* case, subject to rebuttal. As appears from the quotation, the rebuttal

is limited to three things: (1) There must be no conflict in the testimony that the signals were given; (2) the inference to be drawn must be that the person injured was guilty either of gross or wilful negligence, or was acting in violation of law; and (3) that the conduct of the injured party was the direct and proximate cause of the injury.

A statute that makes it impossible to say, as a matter of law, what was the proximate cause of an accident can not be due process of law. Such a statute in effect declares that the presumption created thereby is not rebuttable. True, the railroad in such a suit is accorded the privilege of offering evidence, but of what possible avail is this when the jury is at liberty to render a verdict against it on the vital element of proximate cause *without a vestige of testimony as to proximate cause?* Manifestly, when the overcoming of the presumption as to proximate cause thus rests solely on the whim and caprice of the jury, it is but a mockery to say the defendant railroad is afforded the opportunity to rebut such presumption. Such a right of rebuttal may be given in form, but it is effectually denied in substance. The so-called right of rebuttal "keeps the promise to our ear, and breaks it to our hope." A fair opportunity to repel the presumption being denied, due process of law is not afforded.

Western, etc. R. Co. v. *Henderson, supra,* and cases cited;

Chicago, etc. R. Co. v. *Chicago, supra.*

The appellee here has not made out such a case as should entitle her to recover either in law or in morals.

Take away the impossible testimony of her and her husband that they did not hear any signals and the arbitrary presumption applied to the finding of the jury thereon, and her case would collapse like a house of cards. A recovery by the appellee under the facts of this case solely by virtue of this presumption proves more convincingly than words the fact that it is arbitrary and unreasonable.

As we see it, the appellee has no case on the facts; and the Supreme Court of South Carolina would have been compelled to direct a verdict against her if it were not for the decisions holding that the failure to give signals, even where such failure is not shown by substantial evidence to exist, is a presumption of the existence of negligence on the part of defendant as a proximate cause of the collision. By refusing to direct a verdict in this case, the Court but reiterated the ruling that proximate cause may be established by presumption if a jury so decrees.

But it is said that the presumption arising under sections 4903 and 4925 is a rule of evidence and therefore valid. This, however, will not save these sections. Burden of proof is a matter of substance and not a mere rule of evidence.

> *New Orleans, etc. R. Co.* v. *Harris,* 247 U. S. 367, 62 L. ed. 1167.

It is one thing to provide by statute a reasonable rule of evidence as is done by the Mississippi Prima Facie Act, upheld in the *Turnipseed* case; but quite another to permit presumptions to have the force of substantive evidence and to establish proximate cause

as was done by the Georgia statute held void in the *Henderson* case. This is not due process of law.

In the leading opinion, much space is devoted to a discussion of the necessity for presumptions in the law of evidence. With this principle we are in full accord, but it is wholly beside the mark in so far as the instant case is concerned. As held by this Court in *Western & Atlantic R. Co.* v. *Henderson, supra,* in order for a presumption of fact to arise from proof of a given state of facts, there must be "a rational connection between what is proved and what is to be inferred"; and there is not only no rational connection but *no connection at all* between the failure to give signals by a train for a crossing and an injury sustained by a deaf man in a collision with such train at the crossing, as was presumed in the leading case of *McBride* v. *R. Co., supra.* When the test laid down by this Court in the *Henderson* case is applied, the presumption created by this statute is found to bear no resemblance to a presumption of fact. On the contrary, it is demonstrated to be an arbitrary rule of substantive law arbitrarily adopted as a rule of convenience and precisely of the same nature as the presumption so clearly analyzed by Mr. Justice Holmes in *Charleston, etc. R. Co.* v. *Varnville Furniture Co.,* 237 U. S. 597, 59 L. ed. 1137. Being an arbitrary presumption of such a nature, it clearly falls under the condemnation of the case of *Western & Atlantic R. Co.* v. *Henderson, supra,* and renders the statute void.

Viewed from every angle, there is, as we see it, no escape from holding this statute void as denying due process of law for the reasons above assigned.

2. *By reason of Sections* 4903 *and* 4925, *the standard of conduct to be observed by a traveler and a railroad in the use of a grade crossing laid down by the Supreme Court of the United States in Baltimore & Ohio R. Co.* v. *Goodman,* 275 U. S. 66, *is not applicable in South Carolina.*

The State Supreme Court expressly so ruled in the cases of *Key* v. *R. Co.,* 150 S. C. 29, 147 S. E. 625, *Holladay* v. *R. Co.,* 150 S. C. 243, 147 S. E. 927, and in the instant case. No Federal question was involved in either the *Key* case or the *Holladay* case, and the court distinctly said in both that in cases turning on Federal questions, the Federal decisions would be binding. In the instant case, the train was shown to be engaged in interstate commerce, and in addition, it presented other Federal constitutional questions of the most serious nature.

This Court laid down no new doctrine in the *Goodman* case, but it merely stated a rule of conduct based on the fundamental conception of the rights and obligations of the respective parties based on their situation at the time. The railroad uses a fixed track and its trains are necessarily heavy, and when in motion are not readily, quickly and safely stopped by the use of even the most effective mechanical appliances that human skill and ingenuity have been so far able to devise. This must ever be the case, as the problem grows out of immutable physical laws. On the other hand, the automobile operates on no fixed rail, and is so light, flexible and capable of control that it may either be readily turned aside or quickly brought to

a stop by its driver. Taking judicial notice of these universally known facts, this Court in the *Goodman* case said:

> "When a man goes upon a railroad track, he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train, not the train for him."

This is the gist of the decision, and we submit it is the only decision that can be rendered consistent with due process of law. It is true the court goes on to say that the traveler must get out of his vehicle and look *if the conditions make it necessary;* and to this there never has been advanced any valid objection, if he is under the duty properly to take care of himself, and the railroad company is not held to occupy the position of an insurer of his safety.

This South Carolina statute is the very antithesis to the *Goodman* case, for, carried to their logical conclusions, the decisions rejecting *in toto* the ruling in the *Goodman* case must be held to mean that the rights of the traveler on the highway are superior to the rights of the railroad at the crossing, regardless of the physical facts and conditions of the case. If the rule is not, as the *Goodman* case states, that the train can not stop, while the driver can, and therefore must, stop, then the converse must be true, to-wit, that the traveler is under no duty to stop, while the train can and therefore must stop. Such a result makes the railroad an insurer of the life of every person crossing its track at grade crossings. Instead of being a safety

measure, this statute, by refusing to recognize the principle of the *Goodman* case, puts a premium on negligence on the part of travelers on the highway and tends to promote rather than to prevent accidents.

In the instant case as well as in the cases of *Key* v. *R. Co., supra,* and *Holladay* v. *R. Co., supra,* the court in repudiating the *Goodman* case acted as if the only thing that case decided was that under certain circumstances it was the duty of a traveler in an automobile to get out and look before attempting to cross the track. The court wholly ignored the real ground of the decision to the effect that the duties of the railroad company and of the traveler are mutual, but that by reason of the different physical conditions governing each, the traveler is under the duty to stop and not the railroad company.

In the case of *Stabler* v. *R. Co.,* 160 S. C. 191, 158 S. E. 267, which arose under the very statute we are now attacking, the State Supreme Court, in an unanimous opinion, showed that it approved of the doctrine that in South Carolina by virtue of this statute the rights of the traveler are superior to those of the railroad company when it comes to the use of a grade crossing. We quote:

> "While the Legislature has commanded a traveler on a highway to bring his vehicle to a full and complete stop (35 Stats. at Large, 1316) before entering or crossing any express highway in the State highway system (*Townsend* v. *State Highway Department,* 156 S. C. 545, 153 S. E. 572). It has never seen fit to command that travelers either stop, look, or

listen before entering upon or crossing a railroad track. The duty so to do is not absolute; whether a failure so to do is reckless gross negligence or wilful misconduct depends upon the then surrounding circumstances and the state of the traveler's mind.

The decision in the *Cable* case has been modified by the fourth and fifth paragraphs (pages 402, 403, of 121 S. C., 114 S. E. 500, 503), of the decision in the *Chisolm* case.

As held in the *Chisolm* case: 'It is ordinarily a question for the jury * * * to say whether the attempt of the traveler to cross without looking and listening effectively was excusable or culpable; that is, whether or not it amounted to negligence or wilful misconduct'. See also *Whitehead* v. *A. C. L. R. R. Co.*, 153 S. C. 339, 150 S. E. 769."

This is a direct repudiation of the principle of the *Goodman* case and a declaration that the traveler always has the right of way at a railroad crossing.

As further illustrative of the gross discrimination in favor of travelers on the highways as against railroads in the use of grade crossings, we call attention to the latest deliverance of the South Carolina Supreme Court in *Key* v. *R. Co.*, 165 S. C. 43, 162 S. E. 582. In construing section 4925, the trial court charged the jury:

"It (*i. e.*, the statute) requires the act of the traveler on the highway to be of greater degree of negligence than the negligence of the railroad company in order to defeat the right of recovery on the part of the traveler. Now you

> keep that in mind when considering the liability under the statute."

This charge was approved on appeal, and the *Goodman* case was thereby again repudiated.

Growing out of the physical facts of the situation, the general rule of law governing the rights and obligations of a traveler and of a railroad with respect to the use of a grade crossing is thus well expressed in Shearman & Redfield on Negligence, Volume 2, section 463:

> "The rights of a traveler on the highway, at a point where it is crossed on a level by a railroad are subordinate to those of the railroad company, so far as to require the traveler to give way to any train which is in sight or hearing."

This is but the rule expressed in the *Goodman* case, and it is supported both by reason and by authority.

We insist that the rule of the *Goodman* case is the law of the land as that term is understood with reference to due process of law. This Court expressly declared that this rule was a *standard of conduct* that was clear and unmistakable, and that it *"should be laid down once for all by the courts"*. Can the very converse of this standard of conduct afford due process? To ask the question is but to emphasize the negative reply that must be given to it. This denial of due process of law is brought about by the application by the courts of section 4925. When so applied, this section falls squarely under the cases of *Myles*

Salt Co. v. *Board of Commissioners,* 239 U. S. 478, 60 L. ed. 392, and *Corn Products, etc., Co.* v. *Eddy,* 249 U. S. 427, 63 L. ed. 689, and is therefore void.

From this, it results that the State Supreme Court erred in refusing to sustain exception 6 of the present appellants.

The remaining grounds for asserting that due process of law is denied by this statute arise on the face of the statute itself and are so interwoven with the grounds asserting denial of the equal protection of the laws that they can be best considered under the discussion of that question.

C.—This Statute, Found in Section 4925 in Connection with Section 4903, Denies Railroads the Equal Protection of the Laws.

We consider first the equality denied to railroads by reason of the interpretation and application of the statute by the courts.

1. *Proof of proximate cause is required in all tort cases except when a railroad is the defendant in a crossing collision case.*

The general rule in South Carolina is that a party plaintiff suing in *tort* not only must prove an act of negligence on the part of the defendant, but must prove also that such negligence was the proximate cause of his injury. This rule is universal except when a railroad is sued in a crossing collision case. In the present case, which arose under this crossing statute, *proximate cause was ignored.*

It is respectfully submitted that, while the classification of railroads for many purposes is justified, to take them out of the general rule requiring proof of proximate cause in actions *ex delicto* can be based on no rational grounds. It is simply invidious discrimination.

Frost v. *Corporation Commission,* 278 U. S. 515, 73 L. ed. 483;
Truax v. *Corrigan,* 257 U. S. 312, 66 L. ed. 254;
Connolly v. *Union, etc., Co.,* 184 U. S. 540, 46 L. ed. 679;
Cotting v. *Stock Yards,* 183 U. S. 79, 46 L. ed. 92;
Gulf, etc., R. Co. v. *Ellis,* 165 U. S. 150, 41 L. ed. 666.

Considering both the face of the statute and its construction by the State courts, we find:

1. *This statute makes the railroad liable for simple negligence, and at the same time declares that the traveler can not be defeated unless he was guilty of either wilfulness or a violation of law.*

On this point the language of Mr. Justice Cothran in the dissenting opinion, adopted by Judge Grimball, is so conclusive that we quote at length:

> "The statute is unconstitutional for another reason: It makes an unreasonable discrimination against railroad corporations in the matter of the contributory negligence of the injured person as a defense to the action for damages;

it requires the railroad corporation to show that the injured person, 'in addition to a mere want of ordinary care', was guilty of gross or wilful negligence or a violation of the law; a condition applicable to no other class of tort-feasors under the sun; it has no earthly connection with the police regulation contained in section 4903; it contributes nothing in aid of the enforcement of that section, and was evidently adopted for the purpose of making a railroad corporation an insurer of the safety of every traveler regardless of his conduct. In the case of *Glenn* v. *R. Co.*, 145 S. C. 41, the court goes even beyond the construction theretofore adopted in holding that the gross negligence referred to in the statute is the equivalent of intentional conduct on the part of the traveler, practically a suicide. It is there said:

" 'The term "gross negligence" does not stand by itself in the statute but the context characterizes the meaning and *gives it the significance of wilfulness'*. In other words, the railroad company is not excused if the traveler be shown to have been guilty of a mere want of ordinary care; nor if he be shown to have been guilty of gross negligence, although the statute so declares; he must be shown to have been guilty of wilfulness, and intentional disregard of all care" (R., pp. 211, 212).

The *Goodman* case shows conclusively that if there is any difference between the rights of these parties with respect to the use of the crossing, such difference exists in favor of the railroad. It is true, the *Goodman* case has been repudiated by the State Supreme

Court, but we submit it can not be rejected when it comes to making the test as to whether equal protection of the laws has been afforded.

The statute, as appears from its face, and as construed by the State court, in fixing entirely different rules of liability for the railroad and the traveler on the highway with respect to accidents at crossings, attempts a wholly arbitrary and unreasonable classification.

> *Frost* v. *Corporation Commission, supra*
> *Truax* v. *Corrigan, supra*
> *Connolly* v. *Union, etc. Co., supra*
> *Cotting* v. *Stock Yards, supra*
> *Gulf, etc., R. Co.* v. *Ellis, supra.*

In the *Frost* case the law is stated in these words:

> "The purpose of the clause in respect of equal protection of the laws is to *rest* the rights of all persons upon *the same rule under similar circumstances.*" (Italics added.)

This test inevitably destroys the statute here assailed.

2. *This statute is not applicable to the engineer, through whom the railroad alone acted.*

Section 4925 expressly declares that "the *corporation* shall be liable for all damages caused by the collision," and contains not a word that even tends to authorize a suit by the injured traveler against the engineer. Therefore, the only right of action against the engineer is that given by the common law, and the common law requires the plaintiff to prove not only

negligence on the part of the defendant but negligence as the proximate cause of the injury. And by the common law, the defendant in such a suit can defeat recovery by showing simple contributory negligence on the part of the plaintiff.

This then is the measure of liability of the engineer operating the train involved in the collision. But when we come to the railroad for which such engineer was acting, the rule is entirely different. Then proximate cause is established by presumption, the defense of contributory negligence is denied, and the railroad is relegated to proving as a defense to the acts of its engineer either wilfulness or violation of law by plaintiff as causes of the collision. Such being the situation, the railroad has no action over against the engineer who caused the collision, and must stand and deliver while the engineer goes free. How such gross discrimination respecting the same conditions can bear the remotest resemblance to the equal protection of the laws is beyond our comprehension.

Frost v. *Corporation Commission, supra*
Truax v. *Corrigan, supra*
Connolly v. *Union, etc., Co., supra.*
Cotting v. *Stock Yards, supra*
Gulf, etc. R. Co. v. *Ellis, supra.*

The fact that the railroad company can act alone through its engineer with respect to a crossing accident and be held liable under this statute, while the engineer can not be held liable at all under the statute but the case against him must be under the common law where all of his defenses are still available, while under the

statute common law defenses in favor of the railroad company are cut off, is such a gross discrimination that Judge Shipp, in his concurring opinion (R., p. 216), in effect stated that this of itself was such a vice in the statute as to render it unconstitutional if it had not been open to any other objection. We submit that the conclusion reached by this learned judge is correct, and even if the statute was not void for all the other reasons advanced, this would beyond question make it a violation of the equality clause of the Fourteenth Amendment, and therefore void.

3. *This statute is not applicable to all common carriers involved in the identical transaction.*

The object of this statute as construed and applied by the courts is not reasonable or fair, but constitutes invidious discrimination without any grounds in reason or justice therefor against railroads. This Court must take judicial notice of the fact that today our improved highways are crowded with motor buses and motor trucks engaged in the transportation both of persons and of property. All of the vehicles so engaged are common carriers. When a great motor bus as large as a street car and filled with passengers dashes onto a railroad crossing, the driver neither stopping, nor looking, nor listening, and a collision occurs, the driver or any of his passengers suing in the courts of South Carolina may invoke the provisions of this extraordinary statute. Each, as the representative or patron of the carrier on the highway, may claim the benefit of its arbitrary presumptions, of its

abolition of the ruling in the *Goodman* case, and of its limitation of defenses. It is exceedingly doubtful whether the railroad under our law can have a right of action against either the driver or the owner of the colliding carrier bus, but if it has, the liability must be established by actual proof and not *presumption* of proximate cause, and even then the proof of such proximate cause is not directed to negligence at all but to wilfulness or violation of law by such driver or owner of the bus. The rule established by this statute is not one that works both ways. It is unfair and constitutes an unjust and invidious discrimination against railroads, and therefore violates the equal protection of the laws clause of the Fourteenth Amendment.

Southern Railway Co. v. *Greene,* 216 U. S. 400, 54 L. ed. 536.

In the days before good roads and automobiles, it was one thing to require a railroad merely to explain a collision with a horse and buggy—a mere rule of evidence; but today, to say that every time a train hits an automobile it is guilty of negligence that proximately caused the collision, merely because one witness swears he heard no signal, is quite another. The automobile has revolutionized many things—the Nation's life itself. A rule may have been very well for horse and buggy days, but absurd today. Changed conditions brought about by the advent of automobiles and improved highways make it necessary to apply and enforce constitutional guaranties, where a few years ago there was no reason for such application and enforce-

ment. In speaking of this, in *Euclid* v. *Ambler Co.*, 272 U. S. 365, 71 L. ed. 303, this Court said:

> "In this there is no inconsistency, for while the *meaning* of constitutional guaranties never varies, the scope of their *application* must *expand* or *contract* to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the *meaning*, but to the *application* of constitutional principles, statutes and ordinances, which, *after giving due weight to the new conditions*, are found clearly not to conform to the Constitution, of course, must fall."

By its unjust, unfair and unreasonable discriminations against railroads in favor of travelers on the highway in every particular herein discussed, this statute denies to railroads the equal protection of the laws and by such denial takes the property of the railroads without due process of law and turns it over to plaintiffs alleging injury in crossing accidents. Unless these two protecting clauses of the Fourteenth Amendment have become "a mere rope of sand, in no manner restraining State action" (*Gulf, etc., R. Co.* v. *Ellis, supra*), they compel the conclusion that this statute transcends the power of the State, and must therefore be declared void.

II. Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, 1922, as construed by the Supreme Court of South Carolina, violate the inter-

state commerce clause of the Federal Constitution, and are therefore void. (Assignment of Errors 3; R., p. 218.)

The evidence showed conclusively that the train involved in the accident was carrying interstate mail and interstate passengers. Such train was therefore engaged in interstate commerce.

Galveston, etc. R. Co. v. *Woodbury,* 254 U. S. 357, 65 L. ed. 301;

International, etc. Co. v. *Pigg,* 217 U. S. 91, 54 L. ed. 678.

The rule, as established by this Court, is that "in the absence of congressional action, the States are not denied the exercise of their power to secure safety in the physical operation of railroad trains within their territory, even though such trains are engaged in interstate commerce"; but the requirements of the State "*must not be arbitrary, or pass beyond a fair judgment of what the exigency demands*".

Atlantic, etc. R. Co. v. *Georgia,* 234 U. S. 280, 58 L. ed. 1312.

So that in order for this statute to meet the test thus prescribed, it must first of all be a safety regulation concerning the operations of trains. We have already shown that it is not a safety measure in any sense, but rather an insurance policy in favor of a traveler injured in a crossing collision.

But even if it could stand this test, it can not stand the others, for that it is arbitrary and unreasonable can admit of no doubt.

Now, in the *Goodman* case, this Court declared that when it came to a train on a railroad track and a traveler on the highway that crossed it, the traveler, not the train, must stop for the crossing. This statute reverses things and declares that the train, not the traveler, must stop. This is the only logical conclusion if the *Goodman* case is not law in South Carolina; and its Court declares such to be the case. This Court must know that there are hundreds of grade crossings in South Carolina, the vast majority of which are not inherently dangerous and are seldom used. Yet if the train must be prepared to stop for each of these, manifestly its operation would be seriously interfered with and a burden thus imposed on interstate commerce. In the case of *Southern Railway Co.* v. *King*, 217 U. S. 524, 54 L. Ed. 868, the Court said:

> "Highway crossings may be so numerous and so near together that to require interstate trains to slacken speed indiscriminately at all such crossings would be practically destructive of the successful operation of such passenger trains".

That case went off on a point of pleading, but when the same statute was attacked a second time in this Court and the question was properly raised in *Seaboard, etc., R. Co.* v. *Blackwell*, 244 U. S. 310, 61 L. Ed. 1160, it was held unconstitutional for the very reason stated in the quotation from the *Kings* case, *supra*. This statute, with the *Goodman* case repudiated, does exactly what the Georgia statute did, to-wit, compels the railroads to slacken speed of their trains at all crossings regardless of use or danger so as to be in position to

stop for travelers on the highway. If that statute regulated interstate commerce, this does likewise.

We are not contending that it is beyond the power of the State in the absence of Congressional action to limit the speed of all trains at busy crossings, and to take precautions for the safety of travelers at such crossings. But that is not this statute. With respect to the ordinary grade crossing, the *Goodman* case requires the traveler, not the train, to stop, and further requires the traveler to protect himself. It violates no constitutional principle to require signals for such a crossing, as this is within a "fair judgment of what the exigency demands". When, however, an arbitrary presumption of negligence of the railroad constituting the proximate cause of the accident is based on the failure to give signals *alone*, and it is declared in effect that the rights of the traveler with respect to the use of the crossing are superior to those of the railroad, then the State has stepped in and assumed a power over interstate commerce it does not possess.

In the *Goodman* case, this Court declared it was laying down a standard of conduct to be applied by all courts. For so saying the Court has been criticized, the contention of the critics being that the Court had no power to lay down such a standard of conduct. If not, why not? As we have already shown, this Court, and this Court *alone*, can say what is due process of law and what is the equal protection of the laws, and it clearly and conclusively appears that what the *Goodman* case really decides is merely what these constitutional guaranties compel to be decided as to the

respective rights and obligations of railroad and traveler at a grade crossing.

Likewise, this Court, and this Court *alone*, can say whether a statute burdens interstate commerce. In the *Goodman* case it only declared that when it comes to the use of a grade crossing by train and traveler, interstate commerce shall not be burdened by giving the traveler the right of way and by compelling the train to stop for his convenience.

This statute in effect attempts to legislate out of existence a decision of the Supreme Court of the United States respecting a subject—interstate commerce—over which its power is both exclusive and supreme.

How then, when such Court declares that respecting a train engaged in interstate commerce, the traveler at the crossing must stop for the train, not the train for him, can this South Carolina statute prescribe any other rule and hope to escape condemnation for attempting to regulate interstate commerce in violation of the provisions of the Federal Constitution?

In the dissenting opinion of Mr. Justice Cothran, which was adopted by Judge Grimball, the following additional reasons are given for holding this statute void as laying an undue burden on interstate commerce:

> "For another reason the statute, as interpreted, is an interference with interstate commerce:
>
> Under it the traveler is not to be held guilty of contributory negligence unless the defendant

company makes it appear that in addition to the mere want of ordinary care he has been guilty of gross or wilful negligence or a violation of law; to make it appear that he was guilty of gross negligence, the railroad company must show that he did not exercise even slight care, for gross negligence is the absence of that degree of care; hence the traveler is excused by the exercise of slight care; in other words, that is all that he is required to do.

In this day of heavy automobiles and incorporated passenger buses and freight truck lines, some of them with trailers transporting eighty bales of cotton, 40,000 pounds, is the danger of damage to the interstate train by a collision with them so negligible as to require of the driver only slight care to avoid it? Are the rights of the engineer and trainmen protected by so lax a requirement? Has the passenger upon a through train, interstate commerce, no right to demand even ordinary care on the part of the traveler to avoid a collision? Within the last year, upon a western railroad, a passenger train collided with a loaded freight truck at a crossing; the engine and passenger coaches were derailed and thirty passengers killed or injured. Did the truck driver comply with the law or with the dictates of humanity by exercising slight care? That may have been the rule in the days of horse-drawn vehicles, but not now'' (R., p. 215).

For the reasons advanced by us, as well as those advanced by the dissenting judges, we submit that it has been clearly established that this statute constitutes an unlawful interference with and a burden

upon interstate commerce, in violation of the provisions of the interstate commerce clause of the Federal Constitution, and is therefore void.

Conclusion.

From what has been said, the appellants have clearly established their contentions as to the constitutionality of the statute here under attack in every particular in which it has been assailed. We, therefore, earnestly contend that the three assignments of error should be sustained, that a judgment should be rendered holding Section 4925 of the South Carolina Code unconstitutional, and that the judgment of the State court should be reversed and the complaint dismissed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1932

No. 194

ATLANTIC COAST LINE RAILROAD COMPANY and WILLIAM SMITH, APPELLANTS,

against

KATHERINE H. FORD, APPELLEE

BRIEF ON BEHALF OF APPELLEE

W. C. DAVIS,
Manning, S. C.,

J. W. WIDEMAN,
Washington, D. C.,

THE R. L. BRYAN CO., COLUMBIA, S. C.
12-6-32-40

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Errors in appellants' statement of case, and summary of facts:

(a) That there was not a scintilla of evidence on the five common law specifications of negligence.

(b) That all the required signals were properly given. (Not a single witness for appellant testified that **the bell was ringing or whistle sounding as the engine passed over the crossing;** the most the engineer and fireman would say "was that the air was turned on to ring bell," but neither said the mechanical device did its work, which is not sufficient under *Bamberg v. Railroad,* 72 S. C., 394).

(c) That, because Mr. Ford admitted giving his wife a little taste of liquor when she became nervous over the slippery roads, some broken fruit jars at the scene of the collision, and the incoherent mumblings of two people just after regaining consciousness, it was **clear** the Fords were under the influence of liquor.

It is our understanding "that all questions of fact were settled by the State Courts" (*Hendrix v. Railroad Co.,* 167 U. S., 673-677, 17 Sup. Ct., 922, and cases cited in the opinion), and however sneeringly and unjustly appellant may have characterized appellee's testimony, the fact is the jury has resolved these questions of fact against it, and it appears to us that appellants' grievance, throughout this whole case, is rather against the jury than against the law.

BRIEF

Appellant contends that our crossing statute (R., pages 151-2), violates the due process and the equal protection clauses of the 14th amendment and the Interstate Commerce Clause of the Federal Constitution.

So much has been said as to our Court's construction, interpretation and application of this statute, that it might be of aid to the Court to point out at the very outset of this argu-

ment the propositions of law the appellants and appellee are apparently agreed upon, and then those whereon we disagree.

Points of Law Urged by Appellants that We Agree Upon

(a) That the final constructive and prevailing view of a State statute (not a few isolated and ill considered expressions in some of the earlier cases), by the highest Court of the State are to be considered just as much a part of it as if actually expressed in the text.

(b) That it has been uniformly and repeatedly held in our State that a neglect to give the signals prescribed in Section 4903 is negligence *per se*.

(c) That in a suit under Section 4925 the mere failure to give the signals is not recklessness, wantonness, or willfulness *per se*, so as to warrant an award of punitive damages, but that the reasonable inference from such failure was sufficient to carry that issue to the jury for its determination.

(d) In a suit under the conditions set out in Section 4925 a failure by the railroad to give the required signals is presumed to be the proximate cause of the injury, and to warrant recovery by plaintiff in the event the defendant offers no testimony.

(e) That the burden of proof, notwithstanding the presumption, remains on plaintiff throughout the trial to show a case of actionable negligence.

(f) That Section 4903 is a valid exercise of the police power of the State and its constitutionality must be sustained, notwithstanding its direct effect upon trains employed in interstate commerce.

(g) That in our State one about to cross a railroad at a public crossing is not under the absolute duty to stop, look and listen before going on the track, unless the exercise of ordinary care and prudence, under all the surrounding facts and circumstances, requires the adoption of such a course, and therefore the supposed standard of conduct laid down for the traveler in *B. & O. Railway Company v. Goodman*, 275 U. S.,

66, is not followed there, however much our Court respects the decisions of this Court.

(h) That this statute is not applicable to engineer through whom it acts, and he can only be held liable at common law, and to whom all his common law defenses, including contributory negligence on the part of plaintiff, are still available.

(i) That this statute is not applicable to all common carriers.

(j) That it is not beyond the power of the State, in the absence of congressional action, to require the faithful and prompt performance of duty within its limits, and the exercise of that power is in aid of commerce and does not burden it though incidentally affecting it.

(k) That under Section 4925 the traveler is not held guilty of contributory negligence unless the defendant company makes it appear that in addition to the mere want of ordinary care he has been guilty of gross or willful negligence or a violation of law.

Points of Law Urged by Appellant Upon Which We Do Not Agree

(a) That Section 4925 raises arbitrary and unreasonable presumptions and allows plaintiff to recover thereon without proving proximate cause.

(b) That the presumption arising from the failure to give the signals continues throughout the case and is to be weighed against opposing evidence.

(c) That no Circuit Judge under the decisions of our Court can now direct a verdict for the defendant.

(d) That there is no causal connection between the failure to give the signals and the injury.

(e) That the *prima facie* presumption of proximate cause is not in fact rebuttable under our decisions.

(f) That the rights of the railroad are superior to those of the traveler at a grade crossing.

(g) That our statute requires the train to stop.

(h) That the railroad has no action over against the engineer who caused the collision.

(i) That the statute is unconstitutional because it casts upon each defendant a different duty thereabout, and because a different rule of law is applied as measuring the liability of the two separate defendants.

(j) That the trial Judge overruled motion for directed verdict solely by reason of this Court's decision in the *Turnipseed case.*

(k) That in all actions *ex delecto* in this State there must be proof of proximate cause **except** in collision cases at crossing where a railroad is defendant.

(l) That the plaintiff is required to produce no evidence whatever on the question of negligence or on the question of proximate cause.

(m) That the construction placed upon the statute (Section 4925) by our Court practically insures a recovery by a plaintiff in damage suit for a crossing collision and bears no resemblance to a proper safety regulation.

(n) That under our statute and decisions the presumption can be rebutted **only** by the affirmative defenses of willful conduct and violation of law on the part of plaintiff at time of collision.

(o) That the rebutting evidence of defendant is not, and cannot be, offered as to proximate cause but is addressed solely to the giving of signals.

(p) That in reaching a verdict under this South Carolina statute, the jury does not weigh evidence of actionable negligence offered on the part of plaintiff against evidence of no such negligence offered on the part of the defendant, because the plaintiff is not required to show that the acts of which he complains constitutes either negligence or the proximate cause of the injury.

(q) That proximate cause is not a fact which is subject to inference or presumption, but it must be proved by plaintiff (presumably by positive or direct testimony and not by inferential or circumstantial).

(r) That by the decisions of the State Court it has, in effect, declared that the traveler always has the right of way.

(s) That the statute on its face and as construed by State Court in fixing entirely different rules of liability for the railroad and the traveler on the highway with respect to accidents at crossings, attempts a wholly arbitrary and unreasonable classification.

(t) That Sections 4903 and 4925 as construed by State Court, violate the interstate commerce clause.

Now our chief construction of statute concerns as to the final constructive and prevailing view of the State Court upon this statute, every phase of which, during the nearly fifty years since its passage, has been considered and construed by the Court, and thereby this Court can readily see whether the law we do not agree upon is as contended for by appellant.

We get this final constructive and prevailing view of the Court in the leading case of *McBride v. Railroad Company,* 140 S. C., 260, and which has been followed ever since, in which Justice Stabler, in a clear and able opinion, reviews the earlier cases and lays down the following as the correct view of the statute:

1. The signal statute, as shown by its title, is a regulation for the prevention of accidents and concerning responsibility therefor. The Legislature evidently had in mind that injury to property or person was very likely to occur at a railroad crossing unless proper warning of the approach of trains was given to travelers, and intended by the statute to prevent such injury by requiring the railroad to give such definitely described signals.

2. Under the statute a plaintiff must make it appear: (1) That an injury occurred at a crossing; (2) That there was a failure to give the statutory signals; (3) That such failure contributed to the injury.

(3) In construing the statute this Court has held: (1) That the word "contributed" in the statute means contributing as a proximate cause of the injury; and (2) that failure to give the statutory signals creates a presumption that such failure

caused the injury, unless the testimony shows that the injury was caused in some other manner.

"Under the statute it must appear that the failure to give the signals contributed to the injury, and the decisions of this Court holds that this means contributing as a proximate cause. It does not necessarily follow, however, that the causal relationship must be shown, in the first instance, by evidence, since, as in other cases, a presumption, if reasonable and well-founded, may arise from the proven facts. The rule as to causal relation between the violation of the statute and the injury is clearly stated in 20 R. C. L., at page 43, as follows:

> " 'The meaning of proximate cause in this connection has been explained as follows: If the injury complained of is a natural and probable consequence of a violation of the statute, then that violation is correctly taken as the proximate cause of the injury. If the very injury has happened which was intended to be prevented by the statute law, that injury must be considered as directly caused by the non-observance of the law. But if the injury is one that happened by causes independent of the violation of the statute, it is not actionable on the basis of that violation.'
>
> "From our consideration of this question, we are satisfied that the proper construction of the statute leads to the conclusion that when a person is injured by a collision with the engines or any car or cars of a railroad corporation at a crossing, and the railroad failed to give the statutory signals at such time and place, the presumption arises that the failure to give the signals is the proximate cause of the injury, since such injury is the natural and probable consequence of the failure to give the signals and is the very injury intended to be prevented by the statute. It must be borne in mind that this presumption does not mean that the casual relationship between the failure to give the signals and the injury is shown conclusively. The presumption merely establishes a *prima facie* case, which may be overcome by testimony, whether

given for the plaintiff or for the defendant. This was made clear in the *Strother case;* and later, in the *Drawdy case,* it was held that the presumption in favor of the plaintiff was overcome by the testimony in favor of the defendant."

This well-considered case of *McBride v. A. C. L. Railroad Company* has been followed in the recent cases of *Brogdon v. N. W. Railroad Co.,* 141 S. C., 238; *Glenn v. Southern Railway Co.,* 145 S. C., 41; *Whitehead v. A. C. L. Railroad Co. et al.,* 153 S. C., 339, and we feel satisfied that a careful reading of the entire record will show that the presiding Judge followed the principle as laid down in these cases.

4. An affirmative avoidance of liability under the statute is concisely but comprehensively stated by Mr. Chief Justice Blease in the case of *Glenn v. Southern Railway Company,* 145 S. C., 48, 49, in this language:

"Under the specific terms of the signal statute, the common-law defense of contributory negligence is eliminated from our consideration. The language of the statute (Section 4925, Civil Code 1922), is that, if the failure to give the specified signals contributed to the injury, liability for all damages caused by the collision is imposed upon the railroad company, unless, 'in addition to a mere want of ordinary care,' it is shown that gross or wilful negligence or unlawful act, chargeable to the person injured, contributed to the injury. Negligence signifies inattention, or, in other words, an unconscious failure to realize the danger of the situation. Willfulness signifies conscious disregard of consequences. The term 'gross negligence' does not stand by itself in the statute, but the context characterizes the meaning and gives it the significance of willfulness. This was the construction given in *Boyd v. Railway,* 65 S. C., 326, 43 S. E., 817, to the use of the same term in the charge of the trial Judge, where, from its connection with the other language used in the charge, Mr. Justice Woods said that the meaning must be understood 'that it was not simply

> gross negligence, but negligence gross and reckless of consequences to such degree as to assume the nature of willfulness.'"

It is, therefore, quite evident that appellants' contention under the supposed authority of the cases of *Cirsosky v. Smathers*, 128 S. C., 358; *McCown v. Muldrow*, 91 S. C., 523, and *Whaley v. Ostendorf*, 90 S. C., 281; all of which were decided before the *McBride case*, to the effect that in this State in all cases *ex delicto* there must be proof of proximate cause except in collision cases at a crossing where a railroad is defendant, is in direct variance with the conclusion reached in the *McBride case*.

It is alleged the statute attacked does not afford due process of law, in that it raises arbitrary and unreasonable presumptions and allows the plaintiff to recover thereon without proving proximate cause.

In discussing this feature of the attack on our statute appellants' ingenious and able argument would be almost irresistible if it wasn't based on false premises.

A great deal of time and labor is spent in showing the Court that in all actions *ex delicto* and under the statute the proof of causal connection or proximate cause is essential to recovery. We admit this, and our Court so holds in the *McBride case* and all the cases following in these words:

> "Under the Statute it must appear that the failure to give the signals contributed to the injury, and the decisions of this Court hold that this means contributing as the proximate cause."

We also admit here and now that the burden of doing so never shifts from the plaintiff to the end of the case, notwithstanding the berated presumption.

We think when this Court comes to consider appellants' argument (pages 21-51), it will find it is based upon the following errors:

1. That under Section 4925 there is a presumption of **both** negligence *per se* and the proximate cause of the injury.

2. That proximate cause can be proven only affirmatively and presumably only by positive and direct testimony, and that inferential or circumstantial is excluded.

3. That proximate cause is not a fact which is subject to inference or presumption.

4. That although our Courts have said time and time again that the presumption as to proximate cause is rebuttable, and may be overcome by testimony for the plaintiff or the defendant, and don't even arise if testimony shows injury was caused in some other manner, because our Court hasn't used the words, upon the coming in of such testimony, "that the *prima facie* presumption vanishes," it remains there to be weighed as evidence.

5. That the testimony offered by defendant in rebutting the presumption of proximate cause is, and can only be, directed to showing that bell was rung or whistle blown, **and not to the particular point to which the presumption relates.**

6. That our Courts under the present state of the decisions **cannot** direct a verdict for plaintiff, thus saying the alleged arbitrary presumption has been overcome, or that the plaintiff was responsible for the accident, and this can't be due process.

7. That the only defense of defendant to plaintiff's cause of action under this statute is the gross, willful negligence of plaintiff or his violation of law, contributing to his injury, and therefore he hasn't a fair opportunity to repel the presumption raised against him.

8. That there is not only no rational connection but **no connection at all** between the failure to give signals and an injury to a man suffering from some physical disability that would prevent him availing himself of the warning given by the signals.

9. That the statute here under attack declares a **rule of liability** that has been adopted as a matter of convenience, and is not a rule of evidence.

Had our Courts never said a word about this presumption—in fact, if we had no statute on injuries at highway crossings, and the suit was wholly at common law, we maintain the verdict and judgment in this case should stand; and it must do so even by the rule laid down by Justice Cothran in his dissenting opinion in the *McBride case* and presumably by appellants who rely so largely upon it.

At the foot of page 294 of this dissenting opinion in *McBride case,* Justice Cothran points out what a plaintiff should prove to meet the duty of proving proximate cause, in these words:

> "At the least he should be required to show that he did not know of the train's approach, and that this situation was such that if the signals had been given he would have been notified of it."

In the case at bar plaintiff proved (at least offered testimony to prove):

1. That the defendant ran over and injured her at a public crossing, which she had the legal right to travel, although in plain view of its engineer and fireman for at least five hundred yards or more.

2. That there was a failure to give the signals required at common law or by Section 4903 (contended by appellants to be entirely separate from Section 4925 in which the presumption arises, and which may be considered in this connection).

3. That such failure contributed to her injury as the proximate cause in that, according to Justice Cothran:

> "(a) Neither her husband, the driver, or herself **knew of the train's approach** directly from their rear, notwithstanding they both looked and listened as best they could in a car with curtains up, the morning dark and rainy, a silently running motor and the car almost stopped, the reason for not hearing train given 'that on wet rails a train approaching one makes very little noise and what noise is made is carried to the rear of train and away from you'; the reason for not seeing being 'the dark rainy morning, his confusion of mind from two highways intersecting on the railroad right of way, cars coming and

going, a neighborhood road near by, and looking at directions on detour sign on railroad right of way.' (R., 7, 8, 9, 10, 11, 18, 21, 24, 28, 29).

"(b) **That this situation was such that if the signals had been given she would have been notified of it.**

"All witnesses, except occupants of car, heard the signals at the 500 yard post, but not a single witness testifies that as the train aproached the crossing the signals required by Section 4903 were given in the manner required, or if measured by reasonable care alone, that some other signal than that 500 yards away was given when defendant saw or should have seen plaintiff was going on the crossing. If, as strenuously contended by appellant, the train was in plain view of plaintiff then it necessarily followed that plaintiff's car was in plain view of appellant's engineer and fireman, and not the slightest testimony that any effort was made to check speed of train, when only the slightest checking of the momentum of train (only the rear of car being struck) would have saved plaintiff."

Be all this as it may, the driver of the car and the plaintiff swear **that their situation was such, that had any warning been given as the crossing was approached by train, the car could have been stopped in half its length, and that unless they had wanted to commit suicide they never would have gone on crossing.** (R., 9, 10, 107, 108).

If this doesn't make out a case of actionable negligence at common law regardless of Section 4925—if it does not make out a case of actionable negligence under the statute without any use whatsoever of a presumption—then we must admit that we don't know how to get a tort case to the jury.

But to get back to appellants' false premises.

(1) That under Section 4925 there is a presumption of **both** negligence *per se* and the proximate cause of the action. What is the act of negligence *per se?* The violation of the statute law of the State. It is so declared not because of any

presumption, but because it is in full accord with the general rule of law established in a great majority of the jurisdictions in this country.

20 R. C. L., pages 38, 39.

This act of negligence *per se* is not established by the presumption but by direct and positive testimony.

But when all our decisions declare that the presumption refers to the causal connection only, the proximate cause, it is beyond us to understand how appellants hope to successfully maintain before this Court that there are two presumptions under the statute.

McBride v. Railway, supra; Brogdon v. Railway, 141 S. C., 238; *Glenn v. Railway,* 145 S. C., 41; *Bowers v. Public Service Corporation,* 148 S. C., 161; *Edwards v. Railway,* 148 S. C., 266; *Stabler v. Railway,* 160 S. C., 191.

The argument of appellant at pages 21 and 41, in his zeal to show a non vanishing presumption, to bring our statute in juxtaposition with the Georgia statute, condemned in the *Henderson case,* possibly is explanatory of the necessity of arguing that under our statute presumptions are raised of **both** the act of negligence *per se* **and** the proximate cause.

If the statute required, or our Court held, it was necessary to use the presumption to establish the act of negligence of law violation **(established by positive and direct testimony and which of course cannot vanish throughout the trial),** then there might be some force in appellants' argument "that under our Statute the presumption never vanishes," and is necessarily weighed by the jury against the testimony of defendant, and thus bring it within the condemnation of the Georgia statute under the *Henderson case.*

Appellant says this is the crux of the whole matter.

It might be well just here to call the Court's attention to a point in connection with the arising of this presumption, which appears to have escaped the attention of all the lawyers in the case up to this point. Justice Stabler in the *McBride case* at page 208 says, that our Court in construing the statute has held:

"(2) That failure to give the statutory signals creates a presumption that such failure caused the injury, **unless the testimony shows that the injury was caused in some other manner.**

"It seems to us that there is here a clear implication that the rebuttable presumption never arises **when the testimony shows the injury was caused in some other manner."**

And for all we know the presumption may have never arisen in this case in the first instance, for upon the testimony of the engineer, Smith (R., 50-52), alone, the jury's verdict can very properly be based upon the common law allegations of failing to keep a proper lookout and failure to stop before the collision.

Let us see what this Court meant in the *Turnipseed* and *Henderson cases* by a "vanishing presumption," and what the Circuit Court of appeals meant in *Kirsh v. A. C. L.*, 38 Fed., 2, 963, where the Court was considering an exact copy of the Georgia statute on appeal from a district court of Florida, when it said, "the uniform construction of the Statute by the Supreme Court of Florida is that it merely creates a presumption 'that disappears and comes to an end' upon the submission of proof by a railroad company . . ., for we must admit it has given us considerable trouble."

In 16 Cyc., at pages 1050 and 1051 it is said:

"Generally considered, a presumption of fact is that mental process by which the existence of one fact is infered from proof of some other fact. It is inseparable from inductive reasoning as an inference of the unknown from proof of the known." . . .

"It is based on facts, not on presumptions. No inference of fact should be drawn from premises which are uncertain. Facts (the failure to give signals) upon which an inference may legitimately rest must, is is said, be established by direct evidence as if they were the very facts in issue. One presumption cannot be based upon

another presumption." (The very thing done in the *Henderson case.*)

"It is an assumption made by the law that a strong inference of fact is *prima facie* correct, and will therefore **sustain the burden of evidence,** until conflicting facts on the point are shown. When such evidence is introduced, the assumption of law is *functus officio* and drops out of sight. The inference of fact which has been assumed to be correct continues to have its legalized weight in the case.

16 Cyc., 1073.

"The matter is now a little clearer to us, and we recall how time and time again we have heard our judges in charging juries, say: Gentlemen of the jury, if you find the letter in question was mailed there is a presumption that it was received—or, the law presumes that a minor over seven and under 14 years of age is incapable of committing a crime—both of these presumptions, however, may be rebutted, and I charge you that when all the facts and circumstances are in evidence, 'presumptions, like the Arabs, silently fold their tents and steal away.' "

So then when this Court in the *Henderson case* said:

"That legislation declaring that proof of one fact (violation of signal statute) or group of facts shall constitute *prima facie* evidence of an ultimate fact (proximate cause of injury), is valid."

appellant is driven to desperate lengths when he must convert the negligent act (violation of statute), established by evidence, into a presumption, and argue that our statute must fall under same condemnation as the Georgia statute—construed as it was by the Georgia Court—because you cannot base a presumption upon a presumption—and if you did the presumption would necessarily be weighed against opposing evidence, and therefore run counter to the rule laid down by this Court on this matter.

We are not surprised then, with appellants' misapprehension of the office of the presumption, and his insistence that it is

itself "evidence," that he insists, in charging the last sentence in appellee's 4th request to charge (R., page 130), the Court necessarily permitted the presumption to be weighed against opposing evidence when he used these words: "**All** the **evidence** must be considered in determining the question of proximate cause."

We will proceed now to consider together the second and third errors of appellants shown by his argument, to wit, that proximate cause can be proven only affirmatively and presumably only by positive and direct testimony, and that proximate cause is not a fact which is subject to inference or presumption.

We have never heard before that **any fact** could not be established by inferential or circumstantial evidence as well as by direct and positive. Indeed, it is difficult for us to understand how in many actions *ex delicto,* you can prove proximate cause by direct or positive testimony. Let's go into the actual trial of this case. Plaintiff and her witnesses testify that the signals were not given or that they did not hear them and were in such a position that they could have done so if they had been given. All of the facts surrounding the occurrence are detailed. Then the plaintiff or any witness is asked by counsel what caused her injury? Distinguished counsel for appellants would immediately object, and be sustained by the Court upon the ground that that would be a matter of opinion, let her detail the facts and the jury will draw the conclusion.

Not a single case cited by appellants (page 42 of Argument) supports this position. The *Toops* and *Harris cases* arose under the Federal Employers' Liability Act, **a matter Congress has taken entire jurisdiction over,** and is authority for the proposition that causes under that Act are tried under the common law rules of evidence and is not subject to local law. Under that Act negligence is an affirmative fact which plaintiff must establish. What emphasizes their inapplicability to the point under consideration is, that when plaintiff sought in the *Harris case* to use the Mississippi *prima facie* Act (about which so much is said in this case), to prove negli-

gence, this Court said no, clearly because a cause under a Congressional Act is governed by the rules of the common law.

The *Patton case* holds that the fact of an accident to an employee raises no presumption of negligence on the part of the employer as in case of injury to passenger; it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence (no quarrel with this proposition).

The *Sweeney case* is authority for proposition "that the doctrine of *res ipsa loquitur* does not have the effect of shifting the burden of proof so as to make it necessary for defendant to overcome the presumption of negligence by a preponderance of evidence that there was an absence of negligence on his part, **but defendant is called upon for explanation or rebuttal."**

The *Coogan case,* another action under the Employers' Liability Act, holds, in accordance with our understanding of the law, that circumstances relied on to prove a fact must be proved, and cannot be presumed.

None of these authorities support the position that proximate cause is not a fact which can be proved by inferential or circumstantial evidence, even at common law, and the proposition cannot be correct. Otherwise what this Court said in *Adams v. N. Y.,* 192 U. S., 585:

> "Legislation providing that proof of one fact (the failure to give signals) shall constitute *prima facie* evidence of the main fact in issue (the proximate cause of injury) is but to enact a rule of evidence, and quite within the general power of government. Statutes, National and State, dealing with such methods of proof in both civil and criminal cases abound, and the decisions upholding them are numerous," would be meaningless.

Again in the case of *Insurance Company v. Weide,* 78 U. S., 438, the Court, discussing this question, said:

> "It is well settled that if the evidence offered conduces in any reasonable degree to establish the probability of the fact in controversy, it should go to the jury. It would be

> a narrow rule, and not conducive to the ends of justice, to exclude it on the ground that it did not afford full proof of the non-existence of the disputed fact. Besides, presumptive evidence proceeds on the theory that the jury can infer the existence of a fact from another fact that is proved, and most usually accompanies it. Many of the affairs of human life are determined in Courts of justice in this way, and experience has proved that juries, under the direction of a wise Judge, do not often err in the reasoning which leads to a proper conclusion, the Court has in its own hands the mode and measure of redress."

Look now at the fifth false premise, and I believe here is the main reason why appellants can see "no good thing come out of Nazareth":

If appellant in its many jury trials under the statute addresses its testimony **solely** to showing that bell **was** rung or whistle blown, and doesn't concern itself in rebutting the alleged *prima facie* established proximate cause, we can easily understand the loss of a majority of its cases and the berating of the jury's verdict as capricious.

In the relied on *Henderson case,* this Court said:

> "A *prima facie* presumption casts upon the person against whom it is applied the duty of going forward with his evidence **on the particular point to which the presumption relates."**

What is the particular point to which the presumption relates? Clearly to the proximate cause—the causal connection between the alleged act of negligence and the injury. Now how should defendant rebut that? He can offer under his general denial even, testimony to show that in fact the signals were given, as was done in this case. But that doesn't rebut plaintiff's case—that isn't the main point in issue—that isn't the thing to which presumption relates—that is the fact it operates on. Defendants testimony should be directed **to showing that the alleged proximate cause in fact had nothing to do with her injury;** that even had the signals been given,

nevertheless plaintiff would have been injured from some other cause, or from her own gross and willful conduct or from the violation of some law.

With appellants' idea that his rebuttal testimony is directed solely to the giving of signals, this Court can easily understand why appellant fell into the error of believing that his requests to charge, 4 and 5 (page 23 of its argument), were good law. The Court sees at once that request 4 is right in the teeth of the statute, and that the words "as soon as the railroad company introduced evidence **rebutting plaintiff's evidence that the signals required thereby (the statute) were not properly given for the crossing involved in this suit,** the temporary inference completely vanished etc.," could not be given by the Court.

Even if the trial Judge should have used the words "completely vanished" in connection with the presumption to save the statute, instead of telling jury the presumption was not a conclusive presumption and could be rebutted, as he did do in charge, yet the proposition as presented in 5th request to charge contained two propositions of law, one that may or may not be good, and the other certainly bad, and under the rule announced in *Sweeney v. Erring,* 228 U. S., 233, the Court was justified in refusing to charge it.

If these two requests to charge contained the standard of conduct laid down in the *Goodman case,* appellant certainly was not entitled to have them charged under our law.

The fourth false premise needs very little discussion to show its utter futility in upsetting a statute of a State designed for the safety of its citizens.

4. That although our Courts said time and time again that the presumption as to proximate cause is rebuttable and may be overcome by testimony for the plaintiff or the defendant, and impliedly that it doesn't even arise if testimony shows injury occurred in some other manner, yet because our Court hasn't used the words upon the coming in of such testimony "that the *prima facie* presumption vanishes," it remains there to be weighed as evidence.

Our *en banc* Court in this case says at top of page 172 of the record:

> "Not a single case brought to our attention by attorneys for appellants and relied on in support of the proposition, sustains the characterization of the disputable presumption arising under the crossing statute to the effect that it remains 'throughout the entire case' and is to be weighed as opposing evidence in fixing liability.
>
> "In the cases cited the cases of *McLeod v. Railroad Company,* 95 S. C., 71, and *Thompson v. Railroad Company,* 113 S. C., 261, involved injuries to passengers; the cases of *Matthews v. Railroad Company,* 98 S. C., 204; *Ervin v. Railroad Company,* 106 S. C., 354, and *Perryman v. Railroad Company,* 105 S. C., 34, injuries to stock, and the cases of *Baker v. Telegraph Company,* 57 S. C., 174 and *Glenn v. Railroad Company,* 96 S. C., 357, did not relate to this presumption as they were decided before the case of *McBride v. Railroad Company, supra,* in which case the presumption was defined."

Appellant at foot of page 26 of argument admits this, but says "that the action of the Court in every such case compels the conclusion that such is the effect of such presumption" and then contends that his assumption is true because the presumption does not vanish if **no testimony** is offered by defendant—hence it can't vanish when testimony is offered, notwithstanding this Court in the *Turnipseed case* said:

> "When that is done (defendant offers testimony) the inference is at an end and the question of negligence is one for the jury upon all the **evidence** (not the presumption). **In default of such evidence,** the defendant, in a civil case, must lose, **for the prima facie case is enough as matter of law."**

Appellants' trouble here again is an error formerly pointed out, to wit, that he has misapprehended to what the presumption relates, otherwise he would know that our Court cannot charge on the facts, and tell the jury that the proximate cause

has or has not vanished, what is the proximate cause being always for the jury.

To declare upon such reasoning, a State statute and our Court impinges upon grave constitutional provisions, shows an utter disregard for the rule laid down by Chief Justice Waite in *Sinking Fund cases,* 99 U. S., 718:

> "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown **beyond a rational doubt."** If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive . . . the appeal must be to the Legislature, or to the ballot box, not to the judiciary."

We take up now appellants' sixth false premise:

6. That our Courts under the present state of the decisions cannot direct a verdict for defendant, thus saying the alleged arbitrary presumption has been overcome, or that plaintiff was responsible for the accident, and this can't be due process.

A sufficient answer to this is that our Court in the *Strother, McBride* and other cases said "the presumption could be overcome by testimony for the plaintiff or the defendant, and in the *Drawdy case,* it was held that the presumption in favor of plaintiff **was** overcome by the testimony for plaintiff even, and he was nonsuited.

Moreover, the very authority cited by appellant (*Whitehead v. Railroad Company,* 153 S. C., 339), to sustain this position shows it incorrect. The Court there said:

> "Such presumption may be overcome by evidence, but whether or not such presumption was overcome by evidence, is as a general rule a question for the jury."

And proceeds to state that the trial Judge should refuse to submit case to jury when there was no conflict in testimony, and when it shows it was due to plaintiff's own misconduct.

See also authorities cited by Court (R., page 149), as to when a question becomes issuable in our State and must be submitted to jury, and the rule observed in viewing the testimony on motion for nonsuit, directed verdict or new trial.

It is the duty of a trial Judge to direct a verdict for one of the parties when the testimony and all the inferences which the jury may draw therefrom would be insufficient to support a different finding.

Baltimore & Ohio R. R. Company v. Graeger, 266 U. S., 521; *Chicago M. & St. P. Railway Co. v. Coogan,* 271 U. S., 572.

Seventh false premise: That the only defense of defendant to plaintiff's cause of action under this statute is the gross willful negligence of plaintiff, or his violation of law, contributing to his injury, and therefore he hasn't a fair opportunity to repel the presumption.

These are defendants affirmative defenses.

Our Court at page 176 of the record points out the ridiculousness of this position:

> "A zealous effort to bring the statute under the denunciation of the *Henderson case,* which seems to be erroneously placed in this contention in a relation of judicial rivalry with the imputed infirmities of the *McBride case* in joint condemnation, leads the appellant into the wholly untenable position that the company in rebuttal of the plaintiff's case, is confined to the two affirmative defenses of willful conduct or a violation of the law by the plaintiff at the time of the collision.
>
> "The fact can scarcely be deemed controversial that the presumption does not in the least preclude the company or cut it off from a fair opportunity of bringing forward all competent and relevant testimony arising out of and surrounding the transaction and of such evidentiary force as tends to negative the fact or inference of proximate cause, regardless of the conduct of the plaintiff. It may be true that in many cases such testimony would incidentally establish contributory fault on the part of the plaintiff or his agent, but the defendant is not confined to such evidence if other testimony is afforded by the occurrence, nor is it logical to conclude that if such testimony has the two-fold effect it must become as a matter

> of law so closely assimilated and confined to the one as legally to exclude it as relevant and competent testimony tending to negative the other."

We look upon the eighth false premise as the only one warranting serious consideration by us or this Court, and if we can show this Court a rational connection between the act of negligence (failure to give signals) and the injury, then appellant has no case, for beyond question the want of this rational connection was the main ground upon which the *Henderson case* turned.

8th. That there is not only no rational connection **but no connection at all** between the failure to give signals and an injury to a man suffering from some physical disability that would prevent him availing himself of the warning given by the signals.

We may remark at the outset that the mere fact that McBride and Strother, the former because of an epileptic fit, and the latter because of noise from his machine, could not have availed themselves of the warning if signals had been given, and therefore not entitled to the presumption arising from such failure, is no reason for declaring a statute a denial of due process, passed for the protection of **all persons** who **can** avail themselves of the required warning. Certainly no such physical incapacity was shown in the case at bar.

Appellants' argument on this point is based so largely on the *Henderson case,* the alleged analogy of the Georgia statute to ours, as construed by the respective Courts, that we want at this point to earnestly ask this Court to read carefully the clear, forceful, and we may say, with pardonable pride in the judiciary of our State, the very able and elaborate opinion of Acting Associate Justice Smith found between pages 164 and 184 of the record, in which he so lucidly distinguishes the case at bar from the *Henderson case*—the Georgia statute from our statute—and points out the analogy between the *Turnipseed case* and this case—the Mississippi statute and ours.

It might be well for us to state at this point, however, our

understanding of what was really decided in the *Henderson case,* and that is this:

1. That the presumption arising under the Georgia statute covered too much territory—if the Court will pardon the slang—not only that defendant and its employees were **negligent** in **each** of the **particulars alleged**, many of them contradictory, and five of them not having a scintilla of evidence to support them, but **that every act or omission** in plaintiff's specifications was the proximate cause of the death.

2. That it made defendant liable, **in the absence** of evidence on the part of plaintiff, unless it showed due care in **respect of every matter alleged against it.**

3. That **in the absence** of evidence, the Court necessarily permitted the presumption to be weighed against evidence of defendant tending affirmatively to prove that the operation of train was not negligent in any respect.

4. That the mere fact of collision between a railway train and a vehicle at a grade crossing furnished no basis for any inference as to whether the accident was caused by the negligence of the railway company, or of the traveler, or of both, or without fault of any one.

5. The presumption was used to support **conflicting allegations of negligence.**

6. Notwithstanding these arbitrary presumptions this Court said:

> "Legislation declaring that proof of one fact or group of facts shall constitute *prima facie* evidence of an ultimate fact in issue is valid, **if there is a rational connection between what is proved and what is to be inferred.** A *prima facie* presumption casts upon the person against whom it is applied the duty of going forward with his evidence **on the particular point to which the presumption relates.** A statute creating a presumption that is arbitrary, **or that operates to deny a fair opportunity to repel it,** violates the due process clause . . . (Emphasis added).

It seems to us then, under this announced view of the Court, that just two things determine whether our crossing statute is arbitrary and therefore unconstitutional as a denial of due process, to wit:

(a) Is there a rational connection between what is proved (failure to give signals and injury) and what is to be inferred (the causal relation between the two proven facts, or proximate cause)?

(b) Has the defendant a fair opportunity to repel this presumption?

We have already commented on the latter essential in considering one of the other errors of appellants, and will now address our attention to the former.

Let us not forget that nearly fifty years ago, long before the *McBride case,* Justice McGowan, speaking for the Court in the case of *Kaminilsky v. Railway,* 25 S. C., 53, where a similar question was evidently raised, said:

> "We do not, however, consider that by the aforesaid provision (proof of negligence from a mere failure to give signals) the main object of the Legislature was to make a change in the law of evidence, **but to induce compliance with the previous requirement as to signals.** The rule of evidence as to negligence was made to apply **only** in case of failure to give the required signals, and it is manifest that the purpose was to give **an additional sanction** to the provision requiring the signals to be given."

Again, Chief Justice Gary in *Drennan v. Railway,* 91 S. C., 504, the only other case prior to this one, in which these constitutional questions have been raised in our State since the passage of the Act around fifty years ago, after approving the language of the Court in the *Kaminilsky case,* said:

> "One reason for the change in the rules of evidence (evidently referring to the higher degree of contributory negligence to defeat plaintiff) by Section 2139 (now 4925) of the Code of Laws is, that in many instances the party colliding with the train of cars, is instantly killed,

and the Railroad Company would have a decided advantage, if it was only required to prove that the person injured was guilty of ordinary contributory negligence. The necessity of the case requires proof of more than ordinary negligence on the part of the person injured. A like necessity caused a change in the rules of evidence where cattle were killed by train, as will be seen by the case of *Danner v. Railway,* 4 Rich., 329, in which it was held, that there was a presumption of negligence arising from the mere act of killing the stock."

So then there is a reasonable ground or basis for the statute and its presumption when Justice Stabler says, at foot of page 273, *McBride case:*

"The signal statute, as shown by the title to Article 7 of the Code, is a regulation for the prevention of accidents and concerning the responsibility therefor. The Legislature evidently had in mind that injury to person or property was very likely to occur at a railroad crossing unless proper warning of the approach of trains was given to travelers, and intended by the statute to prevent such injury by requiring the railroad to give certain definitely described signals."

Our Court in contrasting the reasonableness of the inference under our statute and that arising under Georgia statute (R., 176-179), says:

"It may also be quite true that the mere fact of collision or injury at a grade crossing furnishes no basis for any inference as to whether the accident was caused by the negligence of either party or both or without the fault of any one, for it may have been purely an accident or only avoidable by that infallible prudence, foresight, and judgment with which no human being is endowed, but is the same observation logically applicable to the reverse view of the proposition?

"It certainly will not be questioned that an actual absence of knowledge of an approaching train bears a 'rational connection' between such fact and resulting injury

at a crossing by the same train. Indeed, such fact, regardless of whether the traveler should have known, except in cases of utter heedlessness or irresponsible action, is probably the most fruitful cause of such collisions and injuries. If this be true then it naturally follows that the reason cannot revolt at the assumption of a 'rational connection' between the failure to observe a requirement, amounting to a disobedience of the law, intended solely to give effective knowledge and warning of such approach and the strong probability of resulting injury.

"The likelihood of injury from such cause is not more universally recognized than in the wholesome requirement of the common law, which imposes the duty on railroad companies in perhaps every jurisdiction in the union where that system of jurisprudence obtains (including the State (folio 202) of Mississippi), and regardless of supplementary State and municipal enactments and regulations on the subject, to give to the public and individuals such warning of the approach of trains to public crossing as will guard them against danger in the use thereof. *Miller v. Railroad Company,* 140 S. C., 163.

"The existence of a 'rational connection' between the failure of a railroad company to give adequate warning of the approach of a train to public grade crossing and the great probability of consequent injury to a traveler using the same, forcefully impressed by the facts and circumstances surrounding the present case, is nowhere more emphatically recognized and stated than by the Federal Supreme Court in its discussion in some of the cases of the respective duties and rights of the company and traveler at such crossings, and the presumptions attaching to the conduct of the latter in using the same. *Continental Improvement Company v. Stead,* 95 U. S., 161; *Texas & Pacific Railway Company v. Gentry,* 163 U. S., 353; *Baltimore, etc., Railroad Company v. Landrigan,* 191 U. S., 461.

"In the first case mentioned, the Court speaking on this question, in part, said:

> "If a railroad crosses a common road on the same level, those traveling on either have a legal right to pass over the point of crossing, and to require due care on the part of those traveling on the other, to avoid a collision. Of course, these mutual rights have respect to other relative rights subsisting between the parties. From the character and momentum of a railroad train, and the requirements of public travel by means thereof, it cannot be expected that it shall stop for an approaching wagon to make the crossing first; it is the duty of the wagon to wait for the train. The train has the preference and right of way. **But it is bound to give due warning of its approach,** so that the wagon may stop and allow it to pass, and to use every exertion to stop if the wagon is inadvertently in the way. Such warning must be reasonable and timely. . . .
>
> "The right of procedure referred to does not impose upon the wagon the whole duty of avoiding a collision. It is accompanied with and conditioned upon the duty of the train to give due and timely warning of approach. The duty of the wagon to yield precedence is based upon this condition. . . ."

"In commenting on the presumption that the law presumes that a person approaching a railroad crossing uses care, in the case last cited, the Court used this language:

> "The presumption is founded on a law of nature. We know no more universal instinct than that of self-preservation—none that so insistently urges to care against injury. It has its motives to exercise in the fear of pain, maiming and death. There are few presumptions, based on human feelings or experience, that have surer foundation than that expressed in the instruction objected to."

"It is, therefore, quite evident that the *Henderson case* is not controlling in this case as it was the absence of such rational connection between the fact proved and the fact to be

inferred—injury and negligence—that furnished the main ground of the decision in that case.

"It may be observed further in connection with this question, and in emphasis of the distinction shown, that the inference of negligence from mere proof of injury is quite a different thing from the proof of both and an inference of causal proximate connection between the two, where one is likely to result in the other.

"While reasoning may not 'lead from the occurrence back to its cause,' yet it will not, and should not, be condemned as arbitrary if it should lead forward from an act of default, or back to it, so likely to result in injury in the light of human experience and observation, as to necessitate, in the interest of the public safety, a legislative preventive measure and a *prima facie* presumption based thereon, as an additional sanction, to such injury. The Georgia statute, repudiated in the *Henderson case*, and the Mississippi statute, approved in the *Turnipseed case*, both lead from injury back but our statute from a likely cause forward and back.

"Even if it were permissible, contrary to the foregoing conclusion, for the presumption under our statute to be considered and weighed as opposing evidence, still the *Henderson case* would be wholly inapplicable for the reason that it was held as the basic ground of that decision that there was no rational connection between a mere proof of collision, in the absence of evidence, and the alleged negligent acts charging the company with legal responsibility therefor, or that either party, or both, was presumed negligent in a given case from the mere fact of the occurrence, whereas under our statute such reasonable connection does exist between the specific fact of failure to give the signals established by the evidence, and the injury, also shown by the evidence, the reasonableness of which is not only confirmed by general experience but as above stated sanctioned by universal judicial recognition."

In fact had our Legislature in express terms created a legal —a conclusive—presumption of proximate cause, predicated upon the failure to give the signals, instead of requiring the

plaintiff to establish such contribution by the evidence, we cannot see how the statute could be nullified as wanting in due process.

Jones v. Brim, 165 U. S., 180.

"The contention that due process of law is denied by giving a retroactive application to Mississippi laws 1912, enacted after happening of an accident, but before trial, making the proof of the happening of an accident give rise to a *prima facie* presumption of negligence, is too devoid of merit to sustain a writ of error to a state Court, where the latter Court held that the statute cut off no substantial defense, but simply provided a rule of evidence controlling the burden of proof."

Easterling Lumber Company v. Pierce, 235 U. S., 380-82.

We come now to notice the last error of appellant in our summary of errors in connection with the due process feature of the attack.

9th. The statute here under attack declares a **rule of liability** that has been adopted as a matter of convenience, and is not a rule of evidence.

We are not so sure that we understand exactly what appellant means by a "rule of liability." The only legal liability that we know anything about as established against defendant by this statute, and it is not peculiar to the statute, is that, **in default of evidence to the main point in issue (proximate cause) the defendant, in a civil case, must lose for the prima facie case is enough as a matter of law.**

Mobile etc., Ry. v. Turnipseed, 219 U. S., 35.

Certainly the case of *Charleston Railroad Company v. Varnville Furniture Company,* 237 U. S., 597, cited by appellant, as authority for this position, does not sustain it. That case is authority for the position "that Congress has so far taken over the subject of a carrier's liability for loss or damage to interstate shipments by the Cormack Amendment that state enactments providing liability against lost carrier upon its

failure to give place of injury to shipment upon demand, etc., are a burden upon interstate shipments."

Congress has not undertaken to legislate on matter covered by statute now under consideration, and hence local statutes will not be interfered with that have a reasonable basis.

We now take up the second reason urged as a denial of due process.

2. By reason of Sections 4903 and 4925, the standard of conduct to be observed by a traveler and a railroad in the use of a grade crossing laid down by the Supreme Court of the United States in *Baltimore & Ohio Railroad Company v. Goodman,* 275 U. S., 66, is not applicable in South Carolina.

We have already admitted that our Courts hold "that it is not the absolute duty of the traveler to stop, look and listen before going on track" (R., 148).

Our Court in *Chisolm v. Railway,* 121 S. C., 401, has laid down in the form of general rules the mutual and reciprocal rights and duties of railroads and travelers upon public crossings in our state, which are at variance with the *Goodman case.*

> "Even if the rule announced in the case of *Baltimore etc., Railroad Company v. Goodman,* 275 U. S., 66, were controlling in this case, it is apparent that a similar conclusion would have to be reached under a reasonable and common sense view of its application. In the latter case, the plaintiff was familiar with the crossing and surroundings. It was evidently a bright day and there does not appear in the record of the case the slightest suggestion of anything in the least calculated to distract his attention. In the case under consideration the day was dark, misty, and cloudy. The plaintiff and her husband were wholly unfamiliar with the crossing and surroundings. Owing to construction and repair work on other highways, one of which would have furnished them a more direct route to his destination they had wandered to an unknown route. These conditions made it necessary for them to take detour routes, the sign of one confronting

them, according to the husband's testimony, not more than thirty feet from the crossing. The two highways referred to intersected upon the railroad right-of-way, all of which naturally created conditions and a mental attitude of inquiry and confusion quite different from that which appears in the *Goodman case.* In the latter case the record does not disclose any evidence whatsoever that Goodman looked or listened for an approaching train. In this case it was positive that both travelers looked and listened as well as they could under the circumstances.

"With an unobstructed view it is difficult to see how an observation made on such a day by the physical act of getting out of the vehicle would have been more effective than one made just thirty feet from and at the crossing. It is not believed that the *Goodman case* in its broadest intended scope of operation would hold the plaintiff in this case to such a degree of culpability as to defeat her action upon the theory that she was directly and proximately responsible for her injury."

We turn now to the other alleged violation of the Fourteenth Amendment.

This Statute, Found in Section 4925 in Connection with Section 4903, Denies Railroads the Equal Protection of the Laws

1. Proof of proximate cause is required in all tort cases except when a railroad is the defendant in a crossing collision case.

We have already admitted that the burden is upon the plaintiff in actions under this statute to prove proximate cause and our Court shows at page 155 of the record that this position is absolutely groundless and need not be further considered.

2. This statute makes the railroad liable for simple negligence, and at the same time declares that the traveler cannot be defeated unless he was guilty of either willfulness or a violation of law.

We might content ourselves with observing, that if "Legislation providing that proof of one fact shall constitute *prima facie* evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government," as applied to the making out of the plaintiff's case in the first instance, as held in the *Turnipseed* or *Mississippi, case, supra,* then it is surely within the general power of government to enact a rule of evidence by which alone the plaintiff's case can be upset. If "statutes, national and state, dealing with such methods of proof in both civil and criminal cases abound, and the decisions upholding them are numerous," as held in *Adams v. New York,* 192 U. S., 586, there certainly cannot be anything in such rules of evidence repugnant to the Fourteenth Amendment.

Bear in mind any affirmative defense, civil or criminal, must be proved by a preponderance of the testimony at common law, so why should there be anything so objectionable in a statute, designed to enforce care and preserve the lives of the public, that requires just a little higher degree of contributory negligence to defeat plaintiff's action?

If the Legislature believes the giving of these signals so important to the safety of the citizen that a railroad may be indicted and fined for a failure to give them, where is the injustice in requiring this higher degree of proof to escape on the civil side of the Court as a penalty for its delict?

In considering the due process feature we have pointed out that this rule of evidence under the statute was predicated upon the necessities of the case (*Drennan v. Railway, supra*). A similar question to the one now being considered was also presented to the Court in the *Drennan case,* and disposed of in this language:

> "The rule as to classification, under the Fourteenth Amendment to the Federal Constitution, is thus clearly stated by the Court, through Mr. Justice Van Devanter, in the case of *Lindsley v. Natural Carbonic Gas Co.,* 200 U. S., 61:

"'1. The equal protection clause of the Fourteenth Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done, only when it is without any reasonable basis, and, therefore, is purely arbitrary. 2. A classification having some reasonable basis, does not offend against that clause merely because it is not made with mathematical nicety, or, because in practice, it results in some inequality. 3. When the classification in such a law, is called in question, if any state of facts reasonably can be conceived, that would sustain it, the existence of that state of facts, at the time the law was enacted, must be assumed. 4. One who assails the classification in such a law, must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.'

"Section 2139 (now Sec. 4925) of the Code of Laws, was the outgrowth of the necessity for legislation, to protect the traveling public, at highway crossings, and it is peculiarly applicable to railways—in fact, it is difficult to conceive, how any but railways, could be included in the classification. This case, therefore, is embraced within the principles, announced in the case last mentioned."

It seems to us that the underlying principle here is the same that appears in the Act of Congress, approved the 11th of June, 1906, which provides that in all actions brought against common carriers, to recover damages for personal injuries to an employee, or where such injuries have resulted in death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, where his contributory negligence is slight, and that of the employer was gross, in comparison, but the damages shall be diminished by the jury, in proportion to the amount of negligence, attributable to such employee.

Each company under this statute is subject to the same liability, and from each the same security as to giving signals is required. There is no evasion of the rule of equality, where all

companies are subjected to the same duties and liabilities under similar circumstances.

St. Louis, etc., Railway Co. v. Matthews, 165 U. S., 1.

We will next take up:

2. That statute is not applicable to the engineer, through whom the railroad alone acted.

Were it necessary, we might take the position here that this action is for the joint and concurring act of the railroad and the engineer, and by putting in a joint answer with railroad, although not within the terms of the statute, the engineer subjected himself to the proof of the higher degree of contributory negligence in exculpation. But we admit the engineer, notwithstanding this fact, still has all his common law defenses to the failure to give signals, as has the railroad to all the common law allegations in the complaint. The inequality urged by appellant is, "that the railroad has no action over against the engineer who caused the collision, and must stand and deliver while the engineer goes free.

We might remark that the engineer didn't go free in this case, the verdict being against both, but in taking this position appellant surely overlooked the cases of *Jenkins v. Railway Company,* 130 S. C., 180; *Johnson v. Railway Company,* 142 S. C., 125, and *Cannady v. A. C. L. Railway Company,* 164 S. E. R., 237, which are authority for saying "that where the master is held liable for the tort of the servant, the master has right of action to recover from the servant the damages he has been called upon to pay."

Appellant says "the fact that the railroad company can act alone through its engineer with respect to a crossing accident and be held liable under this statute, while the engineer cannot be held liable at all under the statute, but the case against him must be under the common law where all of his defenses are still available, while under the statute common law defenses in favor of the railroad company are cut off, is such a gross discrimination that Judge Shipp, in his concurring opinion (R., page 216), in effect stated that this of itself was such a

vice in the statute as to render it unconstitutional if it had not been open to any other objection."

Had the *Cannady case, supra,* been out at the *en banc* Court hearing, Judge Shipp might not have taken the position he did. However, the cases of *Powell v. Southern Railway,* 110 S. C., 70, and *Atlantic Coast Line Railroad Company v. Feaster* (D. C.), 260 Fed., 881-2 were out, and Judge Shipp and appellant are simply mistaken, as the following language of Judge H. A. M. Smith, the then District Judge for the Eastern District of South Carolina, shows:

> "The position of the Atlantic Coast Line Railroad Company is that the statute known as the Employers' Liability Act, passed by the State of South Carolina, on the 14th day of April, 1916, supersedes all law relating to the relations of employer and employee in a case such as this, where the employer is a common carrier by railroad, and the right of the employee to recover depends entirely upon the terms of that act; whereas, his right to recover as against the other defendant, R. S. Jones, depends entirely upon the common law, making both employer and employee liable to the party injured in a case of injury caused by joint negligence; for this Court cannot in the same cause administer a different rule as to liability to different defendants, the one being the liability imposed by the common law and the other being the rule as to liability imposed by the Employers' Liability Act.
>
> "There are some aspects in which this position would appear to be logical and reasonable and there are decisions of respectable Courts supporting it; but the Supreme Court of South Carolina, in the case of *Powell v. Southern Railway Company,* 110 S. C., 70, 96 S. E., 292, decided on the 5th day of April, 1918, had decided explicitly that, although a railroad company may be liable as an employer under the Act of Congress entitled 'Employers' Liability Act' (Act April 22, 1908, c. 149, page 65 (45 U. S. C. A., 51-59), the language of the South Carolina statute being the same, while the other defendant in that case may be

liable under common law, yet that where the complaint alleged that the transaction was one and that both the defendants had concurrent part in the transaction, it did not matter that the law casts upon each defendant a different duty thereabout; that that consideration does not separate them in the performance of the same act, and that the complainant had a right to allege the existence of a joint tort, and to recover upon the tort as a joint one, although a different measure of liability might be imposed by the Court upon the separate defendants; that although a different rule of law would be applied as measuring the liability of the two separate defendants, that would not be sufficient to change the general character of the tort and convert the right against each defendant into a separable one."

Let us not forget the rules laid down by Justice Van Devanter in *Lindsley v. Natural Carbonic Gas Company, supra,* in the consideration of this question, the second and fourth of which we repeat here:

2. A classification having some reasonable basis, does not offend against that clause (Equality clause), merely because it is not made with mathematical nicety, or, because in practice it results in some inequality.

4. One who assails the classification in such a law (police law), must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

A classification requiring the registration of physicians and surgeons by a Maryland statute, applicable in terms only to those engaged in practice prior to a certain date, an exemption from operation under stated conditions of certain resident and non-resident physicians, was not unreasonable and arbitrary.

Watson v. State of Maryland, 218 U. S., 173.

Chief Justice Gary in *Drennan v. Railway, supra,* after pointing out the necessity for this legislation, and it being peculiarly applicable to railroads, said: "In fact, it is difficult to conceive, **how any but railroads,** could be included in the classification."

We take up now:

3. This statute is not applicable to all common carriers involved in the identical transaction. (The presumed discrimination here is because all motor vehicles are not also subject to its provisions.)

We have never before heard that there was doubt that if a bus runs into a railroad train, or a street car into a train that the railroad could not recover for any injury done its property. In fact, the writer of this brief recalls a case tried in his county, in which he represented the railroad, and in which, **to a suit under this statute** he set up a counterclaim for injury to the engine of the railroad by the traveler, and who was not incorporated even.

A complete and satisfactory answer to this view is found in the case of *McCutcheon v. Railway Company,* 81 S. C., 74, where our Court, quoting with approval from the cases of *Johnson et al. v. Spartan Mills,* 68 S. C., 339, and *Simmons v. Tel. Co.,* 63 S. C., 430, said:

> "Legislation is not unequal or discriminatory in the sense of the equality clause of the Constitution merely because it is special or limited to a particular class. The decisions of the United States Supreme Court established that the Legislature has power to make a classification of persons and property for public purposes, provided such classification is not arbitrary and bears reasonable relation to the purpose to be effectuated, and the equality clause is not violated when all within the designated class are treated alike.
>
> "A classification may be reasonable which, for certain purposes, imposes liability upon a railroad as distinguished from other common carriers. *Ry. v. Mackey,* 237 U. S., 295; *St. Louis, etc., Ry. Co. v. Matthews,* 165 U. S., 1."

We will now consider the third and last ground of attack upon this statute:

II. Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, 1922, as construed by the Supreme

Court of South Carolina, violate the interstate commerce clause of the Federal Constitution and are therefore void.

The termini of this particular train, Charleston and Greenville, the roadbed with its rails lies wholly within the State, it nowhere crossing the State line, and the testimony that it was engaged in interstate commerce was very flimsy indeed; "but assuming that the appellant's train was, at the time and place of respondent's injuries on said public highway crossing, engaged in interstate commerce (*Gladson v. Minnesota,* 166 U. S., 427; *International, etc., Company v. Pigg,* 217 U. S., 91; *Galveston, etc., v. Railroad Company,* 254 U. S., 357), it is well settled by numerous decisions of the Federal Supreme Court that in the absence of Congressional enactment on the subject, the states are not denied the power to promote by legislative enactment safety in the physical operation of railroad trains within their territory, even though engaged in interstate commerce, provided such requirements are not "arbitrary; or pass beyond a fair judgment of what the exigency demands." *Southern Railway Company v. King,* 217 U. S., 524; *Atlantic, etc., Railroad Company v. Georgia,* 234 U. S., 280.

> "It is also well settled that in the absence of congressional enactment or a valid and controlling regulation of the Interstate Commerce Commission, under its congressional grant of power on the subject, and no such act or regulation has been brought to our attention, the police power of the State can be validly exercised on many occasions to insure the faithful and prompt performance of duty within its limits on the part of those engaged in interstate commerce and that the exercise of such power is in aid of interstate commerce and does not burden it though incidentally affecting it. *Railway Company v. Mazursky,* 216 U. S., 222; *Telegraph Company v. Jones,* 162 U. S., 650; *Telegraph* (folio 212) *Company v. Milling Company,* 218 U. S., 406; *Missouri, etc., Railroad Company v. Larabee Mills,* 211 U. S., 612; *Railway Company v. Reid,* 222 U. S., 424; *Stone v. Loan and Trust Company,* 116 U. S., 304; *Smith v. Alabama,* 124 U. S., 465; *Hennington*

v. Georgia, 163 U. S., 299; *New York, etc., Railroad Company v. New York,* 165 U. S., 628; *Gladson v. Minnesota,* 166 U. S., 427; *Smith v. Alabama,* 124 U. S., 465.

"In the course of an able and elaborate opinion by that venerable and able jurist, Mr. Justice Holmes, in the case of *Erie Railroad Company v. Board of Public Utility Commissioners,* 254 U. S., 394, in which the city of Patterson in promotion of the public safety undertook to require the railway company to separate grades at a number of crossings at a great expense, and in which the usual defenses of violation of the due process of law, equal protection of the law, contract impairment, privilege and immunity abridgment and interstate commerce clauses of the Federal Constitution were invoked, said, in part, in response to the last contention:

"If it reasonably can be said that safety requires the change it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil. *Denver & Rio Grande R. R. Co. v. Denver,* 250 U. S., 241, 244, 39 S. Ct., 450; 63 L. Ed., 958; *Union Dry Goods Co. v. Georgia Public Service Co.,* 248 U. S., 372, 39 S. Ct., 117, 63 L. Ed., 309, 9 A. L. R., 1420; *Louisville & Nashville R. R. Co. v. Mottley,* 219 U. S., 467, 31 S. Ct., 265, 55 L. Ed., 297, 34 L. R. A., (N. S.), 671; *Northern Pacific Railway Co. v. Duluth,* 208 U. S., 583, 28 S. Ct., 241, 52 L. Ed., 630; *Manigault v. Springs,* 199 U. S., 473, 480, 26 S. Ct., 127, 50 L. Ed., 274. If the burdens imposed are so great that the road cannot be run at a profit, it can stop, whatever the misfortunes the stopping may produce. *Brooks-Scanlon Co. v. Railroad Commissioners,* 251 U. S., 396, 40 S. Ct., 183, 64 L. Ed., 323."

In the case of *Smith v. Alabama, supra,* Mr. Justice Matthews, delivering the opinion of the Court, in part, said:

"It is to be remembered that railroads are not natural highways of trade and commerce. They are artificial crea-

tions; they are constructed within the territorial limits of a State, and by the authority of its laws, and ordinarily by means of corporations exercising their franchises by limited grants from the State. The places where they may be located, and the plans according to which they must be constructed, are prescribed by the legislation of the State. Their operation requires the use of instruments and agencies attended with special risks and dangers, the proper management of which involves peculiar knowledge, training, skill, and care. The safety of the public in person and property demands the use of specific guards and precautions. The width of the gauge, the character of the grades, the mode of crossing streams by culverts and bridges, the kind of cuts and tunnels, the mode of crossing other highways, the placing of watchmen and signals at points of special danger, the rate of speed at stations and through villages, towns, and cities, are all matters naturally and peculiarly within the provisions of that law from the authority of which these modern highways of commerce derive their existence. The rules prescribed for their construction and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the limits of the local law. They are not *per se* regulations of commerce; it is only when they operate as such in the circumstances of their application, and conflict with the expressed or presumed will of Congress exerted on the same subject, that they can be required to give way to the supreme authority of the Constitution."

The case of *Gladson v. Minnesota,* 166 U. S., 427, is so nearly on all fours with the case at bar that we think it conclusively settles the point against appellant and we quote liberally from it.

In this case a statute of the state required every railroad corporation to stop all regular passenger trains, running wholly within the state, at its stations at all county seats long enough to take on and discharge passengers with safety.

"On the afternoon of July 2, 1893, the complainant was a passenger on a train of the company running from St. Paul to Duluth, and held a ticket for a passage from Rush City to Pine City, both being stations on the line between St. Paul and Duluth, and Pine City being a village of eight hundred inhabitants and the county seat of Pine County; but, although he showed his ticket to the conductor, the train was not stopped at Pine City. The train was a fast express train, known as 'the limited,' carrying passengers and the United States mail, running daily from St. Paul to Duluth only, stopping for wood and water at Hinckley, and at railroad crossings and junctions at Rush City and elsewhere, but not scheduled to stop at Pine City or other stations on the way. The mail, and about one-third of the passengers, on the average, were destined for West Superior, and were transferred at West Duluth in the State of Minnesota to another train of the same company running thence to the city of West Superior in the State of Wisconsin, just across the line between the two states. To have stopped the train at Pine City would have caused a loss of time of from five to seven minutes, and an expense of from $1.25 to $1.60. Two passenger trains and a mixed train passed daily each way over the road from St. Paul to Duluth, stopping at Pine City."

The engineer was indicted and convicted.

"The defendant, as stated in his bill of exceptions moved the Court for his discharge, on the ground that the statute under which the complaint is made is unconstitutional on its face, not falling within the legitimate scope of the police power of the state, consequently being a taking of the property of this railroad company without due process of law; that, even if it is not unconstitutional on its face, it is unconstitutional as applied to the train in controversy; in the first place, being an attempt on the part of the State to regulate interstate commerce; and secondly, being an unlawful interference with and an attempt to regulate the United States mail."

The Court held: "That such requirement was a reasonable exercise of the police power of the state, and does not take property of the company without due process of law; nor does it, as applied to a train connecting with a train of the same company running into another state, and carrying some interstate passengers and the United States mail unconstitutionally interfere with interstate commerce, or with the transportation of the mails of the United States."

CONCLUSION

"If the statute be, as held in the *McBride case,* one of regulation 'for the prevention of accidents and concerning the responsibility therefor'; if the 'Legislature evidently had in mind that injury to person or property was very likely to occur at a railroad crossing unless proper warning of the approach of trains was given to travelers, and intended by the statute to prevent such injury by requiring the railroad to give certain definitely described signals'; if the presumption as defined attaching to the proof of failure to comply therewith 'affords only an additional sanction to the provision requiring such signals to be given and an inducement to compliance with such requirement,' then it is quite certain that the statute is clearly sustained under a valid exercise of the police power of the state and otherwise provides due process of law as against the objections urged in full conformity with the guarantee of the Federal Constitution as construed by the Federal Supreme Court and our own decisions.

"As the statute imposes the prescribed duties on 'each locomotive engine or interurban car' whose track is crossed by a public highway, street or traveled place; exacts from each the same security in the interest of the public safety; relates to all persons using the latter at such designated places and subjects the company to the 'same duties and liabilities under similar circumstances,' we are at a loss to conceive wherein the statute is violative of any phase of

the equal protection of the law clause of the Federal Constitution upon the grounds stated.

"The jury were fully instructed on the essentials of the action, the issues involved, negligence, contributory negligence and willfulness, the respective duties of the company and traveler, under the statute and at common law, upon approaching a highway crossing, the burden of proof resting on each and the basis and measure of damages, in the course of which they were specifically instructed that it was 'not every negligence which subjects one to payment of damages' but that 'it is necessary to show that negligence was the proximate cause of the injury complained of'; that under the statute the plaintiff must not only prove the failure to give the signals but the causal connection between such failure and the alleged injury and must prove 'both by the preponderance of the evidence'; that while a presumption of proximate cause arises from a failure to give the signals, such presumption is and would be rebuttable by evidence and the jury should consider any and all evidence that may be in the case in determining the question of proximate cause'; that there was a presumption of innocence in favor of the company with regard to the violation of the statute and that the 'burden is on the plaintiff of proving that the statute was violated.'"

The case having been fairly tried and the appellant given the benefit of all the law applicable to the issues, none of it infringing the constitutional provisions referred to, we believe this Court should, and will sustain the judgment of the State Court and dismiss the appeal.

Respectfully submitted,

W. C. DAVIS,
Manning, S. C.
J. W. WIDEMAN,
Washington, D. C.

SUPREME COURT OF THE UNITED STATES.

No. 194.—October Term, 1932.

Atlantic Coast Line Railroad Company and William Smith, Appellants, *vs.* Katherine H. Ford. } Appeal from the Supreme Court of the State of South Carolina.

[January 9, 1933.]

Mr. Justice Sutherland delivered the opinion of the Court.

This is an action brought by appellee in a South Carolina state court of first instance against the railroad company and its engineer to recover for injuries said to have been sustained by her as the result of a collision at a public highway crossing between an automobile in which she was riding and a passenger train of the company. The complaint alleges several grounds of negligence, but the only one necessary for our consideration is that appellants negligently failed to give the crossing signals provided for by the state law.

By § 4903, Vol. 3 of the Code of South Carolina (1922), a railroad company is required to place on each locomotive engine a bell of at least thirty pounds weight and a steam or air whistle, and "such bell shall be rung or such whistle sounded by the engineer . . . at the distance of at least five hundred yards from the . . . traveled place, and be kept ringing or whistling until the engine . . . has crossed such highway . . ."

Section 4925 provides:

"*Injuries at Crossings—Penalty and Damages.*—If a person is injured in his person or property by collision with the engines or any car or cars of a railroad corporation at a crossing, and it appears that the corporation neglected to give the signals required by this Chapter, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment, as provided in the preceding Section, unless it is shown that in addition to a mere want of ordinary care the person injured, or the person having charge of his person or property, was at the time of the collision guilty

of gross or wilful negligence, or was acting in violation of the law, and that such gross wilful negligence or unlawful act contributed to the injury."

Appellants answered the complaint, denying liability and setting up affirmative defenses. The cause was tried before the court and a jury. At the close of the evidence, appellants moved for a directed verdict in their favor upon the ground, among others, that §§ 4903 and 4925 of the code, as they had been construed, constituted a violation of the due process of law and equal protection of law clauses of the Fourteenth Amendment, and an unlawful attempt to regulate interstate commerce. The motion was overruled, and the jury after being instructed returned a verdict in favor of plaintiff, upon which judgment was duly entered. The state supreme court affirmed the judgment. — S. C. —.

The attack upon the statute as contravening the due process clause is based upon the contention, shortly stated, that the state supreme court, by affirming the judgment, in effect construed the statute to mean that failure to give the prescribed signals is negligence *per se* and raises a presumption that such failure is the proximate cause of the collision and warrants recovery by the plaintiff without further proof, *and that such presumption does not vanish from the case upon the introduction of evidence by the railroad company, but remains throughout to be considered by the jury as evidence.* We have italicized the words which are said by appellants to constitute the crux of their contention.

Appellants review many decisions of the state supreme court dealing with the question, which seem not to be altogether in agreement; but it is not necessary to analyze these decisions and from them attempt to extract the rule. The court below has done this and reached a conclusion contrary to that advanced by appellants; and that is enough for the purposes of our decision here. If the assailed provisions as construed and applied in the present case afford due process, appellants cannot complain that in earlier cases they were so construed and applied as to deny due process to other litigants. Compare *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.*, — U. S. — (Dec. 5, 1932); *Patterson* v. *Colorado*, 205 U. S. 454, 460; *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 680; *Dunbar* v. *City of New York*, 251 U. S. 516, 518-519; *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444, 452; *Fleming* v. *Fleming*, 264 U. S. 29, 31.

The jury, upon this subject, was instructed as follows:

". . . under that statute, it is incumbent upon the plaintiff here first to prove that the crossing signals were not given, . . . and then she must prove, and prove both by the preponderance of the evidence as I have already charged you, that that failure to give the signals contributed to the injury of which she is complaining.

. . . . . .

"Where the signals are not given as in the manner provided by statute, and an injury occurs at the crossing of railroad and public highway, a presumption would arise that the failure to give the signals is the proximate cause of the injury. But such presumption would be rebuttable by evidence, and the jury should consider any and all evidence that may be in the case in determining the question of proximate cause. . . . the failure to give these signals raises that presumption, but it is rebuttable; it is not a conclusive presumption. That may be rebutted by the defendants by its [their] evidence, and as stated here, all the evidence must be considered in determining the question of proximate cause."

Immediately preceding the charge to the jury, the trial court, ruling upon the motion for a directed verdict, had quoted the words of this court in *Western & Atl. R. Co.* v *Henderson*, 279 U. S. 639, 643, used in comparing the Georgia statute there under consideration with the Mississippi statute considered in *Mobile, J. & K. C. R. R.* v. *Turnipseed*, 219 U. S. 35:

"Each of the state enactments raises a presumption from the fact of injury caused by the running of locomotives or cars. The Mississippi statute created merely a temporary inference of fact that vanished upon the introduction of opposing evidence. [citing cases] That of Georgia as construed in this case creates an inference that is given effect of evidence to be weighed against opposing testimony and is to prevail unless such testimony is found by the jury to preponderate."

And the effect of the ruling of the trial court is that the South Carolina statute was comparable with that of Mississippi and not with that of Georgia. It must be supposed that the court, with this in mind, intended to charge the jury in accordance with the language which it had just quoted. True, the jury was not told in so many words that where countervailing evidence has been put in the presumption comes to an end, but we think this is the fair purport of the language of the court to the effect that appellants

may rebut the presumption by their evidence, and that then all the evidence must be considered in determining the question of proximate cause. Certainly, the charge contains no affirmative words directing the jury in that event to consider the presumption as evidence to be weighed with other evidence in the case. Under these circumstances, a request for a more explicit instruction in exact accord with what had just been read as to the Mississippi statute undoubtedly would have been granted; but that request was not made. Instructions are entitled to a reasonable interpretation, and are not generally to be regarded as the subject of error on account of not being sufficiently definite, if omissions complained of are not at the time pointed out by the excepting party. *Castle et al.* v. *Bullard,* 23 How. 172, 189-190; *First Unitarian Soc.* v. *Faulkner et al.,* 91 U. S. 415, 423; *Tweed's Case,* 16 Wall. 504, 515-516; *Locke* v. *United States,* 2 Cliff. 574, 15 Fed. Cas. 740, 742 (No. 8,442).

A reading of its opinion leaves no doubt that the state supreme court construed the statute as creating a presumption limited by the rule of the *Turnipseed* case, *supra* (at p. 43), and considered the charge of the trial court as in harmony with that view—namely, that the legal effect of the presumption was to cast upon the railroad company the duty of producing some evidence to the contrary, whereupon the inference was at an end, and the question became one for the jury upon all of the evidence. Appellants' contention that the presumption fell within the principle laid down as to the Georgia statute in the *Henderson* case, *supra,* was rejected, and the court said that no decision brought to its attention sustained "the characterization of the disputable presumption arising under the crossing statute to the effect that it remains 'throughout the entire case' and is to be weighed as opposing evidence in fixing liability."

The Georgia statute involved in the *Henderson* case was of an entirely different character. As construed by the Georgia court, it not only permitted the presumption of negligence to be given the effect of evidence to be weighed against opposing testimony and to prevail unless such testimony was found by the jury to preponderate, but it was fundamentally arbitrary, in that the mere fact of collision between a railway train and a vehicle at a highway grade crossing created a presumption that the accident was

caused by the negligence of the company. The mere fact of such a collision, we said, "furnishes no basis for any inference as to whether the accident was caused by negligence of the railway company or of the traveler on the highway or of both or without fault of anyone. Reasoning does not lead from the occurrence back to its cause." Moreover, the presumption was invoked to support *conflicting* allegations of negligence. Our decision in that case appropriately might have been cited here if we were considering a statute construed to mean that mere proof of collision at a crossing creates a presumption that the bell was not rung or the whistle sounded. But the rational connection between the fact proved and the fact inferred is plain enough when the proposition is put conversely, namely, that proof of failure on the part of the railroad to give the statutory signals raises a presumption that such failure is the proximate cause of the injury.*

It follows that the statutory presumption as construed by the court below is free from constitutional infirmity under the due process clause.

The objection that because the presumption applies only to railway companies, its effect is to deprive appellants of the equal protection of the laws is clearly untenable. *Atlantic Coast Line* v. *Georgia*, 234 U. S. 280, 289; *Kansas City Ry.* v. *Anderson*, 233 U. S. 325, 330; *Seaboard Air Line* v. *Seegers*, 207 U. S. 73, 76; *Mobile, J. & K. C. R. R.* v. *Turnipseed, supra; Missouri Railway Co.* v. *Mackey*, 127 U. S. 205, 209. There is even less ground for the final contention that the statutory presumption under consideration violates the interstate commerce clause of the federal Constitution. Upon that point we are satisfied with what was said by the court below upon the authority, among other cases, of *Atlantic Coast Line* v. *Georgia, supra*, at p. 290, and *Southern Railway Co.* v. *King*, 217 U. S. 524, 531-533.

Judgment affirmed.

*In addition to the Turnipseed case, see Bailey *v.* Alabama, 219 U. S. 219, 238; Luria *v.* United States, 231 U. S. 9, 25; Yee Hem *v.* United States, 268 U. S. 178, 183.